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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 1-8847

COTLER DRUGS, INC., et al. and LOUIS PATLOGAN, formerly doing business as PATLOGAN'S WESTERN PHARMACY,

Petitioners,

vs.

CHAS. PFIZER & CO., INC., et al., STATE OF WEST VIRGINIA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT COURT

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No. ——

COTLER DRUGS, INC., et al. and LOUIS PATLOGAN, formerly doing business as PATLOGAN'S WESTERN PHARMACY,

Petitioners,

vs.

CHAS. PFIZER & CO., INC., et al., STATE OF WEST VIRGINIA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT COURT

Petitioners, Cotler Drugs, Inc., et al., being plaintiffs, intervenors and claimants in a national class of wholesaler-retailer druggists, which case was consolidated with ten other cases, all the parties and intervenors of which were designated as representatives of that national class,

and Louis Patlogan, a claimant and petitioner in the District Court and member of that class; on behalf of themselves and all members of the class, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled cases (Court of Appeals Nos. 35700-35784) on March 29, 1971, affirming the judgment of the United States District Court in the Southern District of New York.

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York is reported as follows: *State of West Virginia* v. *Chas. Pfizer & Co., et al.*, 314 F. Supp. 710 (S.D.N.Y. 1970) is set forth in Appendix I to this petition, *infra.*

Petitioners, pursuant to 28 U.S.C. §1292 (b) appealed from the orders and judgments of the District Court. On March 29, 1971, the United States Court of Appeals for the Second Circuit affirmed the ruling of the District Court. *State of West Virginia* v. *Pfizer & Co., et al.*, ——— F. 2d ——— (2nd Cir. March 29, 1971) not yet officially reported; a copy of that decision and opinion is set forth in Appendix II to this petition, *infra.*

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 29, 1971. (See Appendix II) No rehearing or extension of time was either sought or granted. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

One of several important and timely issues here involved relates to the rights of States and other Governmental entities (CCS plaintiffs) to utilize the Federal antitrust laws to maintain treble damage actions for individual consumers, as their representative, under Rule 23 of the Federal Rules of Civil Procedure, and under a *parens patriae* concept refuted by all courts — and then to retain funds unclaimed by these individuals as their representative. Inherent in this issue is the use of procedural Rule 23 to alter the substantive rights of parties and a complete disregard for the safeguards set up by the framers of the new Rule 23. The *parens patriae* question in a related context is presented in *Hawaii* v. *Standard Oil Co.*, 431 F. 2d 1282 (9th Cir. 1970), now pending on certiorari in this Court. This Court's recognition of the importance of the *parens patriae* issue by granting certiorari in the *Hawaii* case makes it necessary for this Court to complete its examination of rights, or the lack of such rights, of states, cities and counties to represent individual resident citizens under *parens patriae* or Rule 23.

At issue are the lower Courts' interpretations of *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) and the conflict of the lower Courts opinions, both in principle and in decision with this Court's holdings in *Chattanooga Foundry and Pipe Works* v. *Atlanta*, 203 U.S. 390 (1906), *Southern Pacific Co.* v. *Darnell Taenzer Lumber Co.*, 245 U.S. 351, *Adams* v. *Mills*, 286 U.S. 397 (1932) and *Hanover Shoe, Inc.*, as to the questions of "pass-on," the increased costs of doing business rather than profits being the criterion of damage, multiple recovery, and the standing to sue of con-

sumers who are not direct purchasers from the price fixers.

This case is a multiclass action involving the misnomer of a "settlement" in the acceptance by all classes of a global offer in which the accepting classes were competing for the allocation of the overall fund to their respective classes based upon the applicable facts and law and on a judicial determination by the Court in accordance with Rule 23(e) after the filing of claims. Under these circumstances the entire question of the Court's role under Rule 23(e) and its duty to absent members of the classes and to follow well settled principles of law are present.

At stake is the matter of professional class attorneys running the Courts and creating situations under alleged "settlement" contexts in which they become the beneficiaries and the true parties in interest on the basis of all legal precedent in antitrust law being ignored.

Specifically the questions presented for review of this Court are:

1. Whether in a multiclass action where all classes are competing for the same fund, and one class consisting of States and other Governmental entities, competing for that fund may maintain antitrust actions for treble damages as representatives of the individual consumers within their borders, under Rule 23 or under a *parens patriae* concept?

2. Whether these same States and governmental entities, having an adverse interest by competing for the same fund as the consumer class they purport to represent, can predetermine an allocation to that consumer class prior to the filing of claims by that class, and then retain for themselves unclaimed funds belonging to mem-

bers of that class in violation of their fiduciary obligation to the class they purport to represent?

3. Whether procedural Rule 23 can grant to consumers, who are not direct purchasers from price-fixers, standing to sue under Section 4 of the Clayton Act?

4. Whether the Court under Rule 23(e), as a party to the compromise with a duty to absent members of the classes, is not obligated in a settlement context to follow well-settled principles of law and particularly in all cases involving multiclasses who have accepted an overall sum but are competing for allocations from that fund to each of their classes?

5. Under the circumstances recited in 4 above, where the classes relied on the Court considering the claims filed, and following well-settled principles of law—has not the failure of the Court to do so denied to any such class member the right to opt out of the "settlement" and thereby denying such class members due process of law under the Fourteenth Amendment by purporting to lock in and bind absent class members?

6. Whether the lower courts erred in ruling that wholesalers and retailers were not *injured* persons under Section 4 of the Clayton Act (15 U.S.C. §15) and, therefore, had only a "nuisance" claim, while at the same time affording consumers who purchased from those wholesalers, and retailers in free and unrestrained markets standing to sue as a class, in view of the holding in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968)?

Inherent in this question are the errors of the lower Courts in regard to "pass-on," cost-plus basis, and denying that "increased costs of doing business' is sufficient proof of damage regardless of profits.

7. Whether the Court of Appeals erred in creating the concept of assignment by silence by consumers, who failed to file claims, in the publication of notice in 43 states, which purported to assign to the Cities, Counties, and States as class representatives any money that an individual consumer might become entitled to under Section 4? Whether a class notice by one publication to a consumer class of some 60 million people, which makes silence an affirmative act, is constitutional under the due process provisions of the Fifth and Fourteenth Amendments?

8. Whether due process of law in multiclass litigation involving antitrust plaintiffs in various strata of the market is afforded by notices to a class in a claims contest over an alleged undetermined and unallocated global offer when (a) that notice fails to inform the class of the predetermined allocation, and (b) invites participation by filing claims against an overall fund for only two of three classes, and then (c) the Court awards to CCS plaintiffs large sums of *unclaimed* consumer funds based on an arbitrary predetermined allocation to the consumer class by these same CCS plaintiffs?

9. Whether in multiclass actions, where the different classes are competing for the same fund, professional class attorneys can be attorneys of record for more than one competing class, can place former co-counsel on the Committee of Counsel for a competing class, can separate a class from the general settlement and treat that class on a different basis than a class within the settlement that is identically situated in respect to antitrust laws —with some of the same lawyers representing each of these two classes—all under the spurious umbrella of an alleged "settlement"—where all antitrust precedent is violated? Material to this question is the fact that since new

Rule 23 virtually all antitrust cases have resulted in settlements—and now in the area of multiclass antitrust price-fixing actions where all the classes are competing for the same fund—it is necessary for the supervisory powers of this Court to be exercised to set up the ground rules for these situations.

10. Is the global settlement, which is subject to competing classes dividing the total sum, really a settlement or is it more in the nature of an interpleader, with the contest being between plaintiffs so that discovery and other attributes of an adversary proceeding among plaintiffs should have been permitted and even required?

11. Should classes competing for a total sum in a global settlement have the same standard for filing or making claims, or can some classes constitutionally be excused from filing claims while others are not, and some allowed to recover in excess of claims filed while others must take a small percentage of claims filed, and can some classes be excused from any affirmative action requirement?

12. Is the denial of the right of one class to opt out of a settlement a denial of due process when competing classes have full rights to opt out?

13. Does constitutional due process require that the individual claimant be given the right to opt out after it is known what his class will receive when he originally accepted an overall amount of $100 million without any knowledge of the total participation of his class?

14. Is a competing class in a global settlement constitutionally prejudiced when

(1) Some of the class representatives (in key positions) also represent a competing class?

(2) Some of the class representatives also represent a related but non-competing class in a different settlement group, which related class is in exactly the same point in the chain of distribution, but which related class receives 10 times the award on a comparative purchase basis without any proof of damage?

15. Is it a denial of due process for the District Court, in absence of any substantial discovery, and in reliance on the criminal record in determining probability of recovery

(1) To approve only a nominal share of a "global settlement" to the only class of three competing for allocation for which there appeared to be evidence of a price-fixing conspiracy, according to the federal prosecutors and judge in the criminal proceeding? and

(2) Where the criminal proceeding indicated the lack of any price-fixing on the CCS level, yet CCS was awarded 87% of the "global settlement" for less than 10% of the purchases?

16. Did the District Court err in determining that the wholesaler-retailer class used a uniform mark-up based on one affidavit filed in support of the use of a 66 2/3% mark-up, and in disregard of evidence to the contrary?

17. Can a substantial number of members of a class have their rights extinguished without any notice whatsoever, not even by publication?

18. Are absent class members denied adequate representation and due process when the selection of class representatives and class attorneys is based solely on the acceptance of the defendant's settlement offer by those representatives and attorneys and a requested hearing on such selections is denied?

19. In a multiclass action, is $100,000,000 overall settlement fund adequate and fair to absent members of a class, where one class has over $700,000,000 in overcharges and $345,000,000 in purchase claims if its class allocation is not based on claims filed?

STATUTES INVOLVED

1. The Clayton Act, Section 4 (15 U.S.C. §15) provides:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

2. The Sherman Act, Section 1 (15 U.S.C. §1) provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

3. Rule 23—Class Actions (Federal Rules of Civil Procedure, 28 U.S.C.):

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative

parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct be dispositive of the interests of the other members for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted partially as Class Actions.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to inter-

vene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.
As amended Feb. 28, 1966, eff. July 1, 1966.

STATEMENT OF THE CASE

These are sixty-six civil actions for treble damages initiated by Cities, Counties and States (called CCS class) and wholesale and retail druggists throughout the United States (called the wholesaler-retailer class) as purchasers of the products involved—broad spectrum antibiotics and antibiotic products for human consumption. All of the present actions were either filed in the Southern District of New York or were transferred by the Judicial Panel on Multidistrict Litigation for coordinated or consolidated pretrial proceedings. *In Re Antibiotic Drugs*, 295 F. Supp. 1402 (1968). Plaintiffs-petitioners are members of the consolidated wholesaler-retailer class. All of these complaints arise under Section 4 of the Clayton Act (15 U.S.C. §15) and Sections 1 and 2 of the Sherman Act (15 U.S.C. §1, 2) and grow out of an alleged conspiracy by defendants, Chas. Pfizer & Co., Inc., American Cyanamid Company, Bristol-Myers Company, Olin

Mathieson Chemical Corporation, and The Upjohn Company, to fix the prices of broad spectrum antibiotics and antibiotic products (tetracycline, etc.) for the years 1954-1966.

Three of the five defendants were convicted in the Government's criminal case. *United States* v. *Chas. Pfizer & Co., et al.*, 281 F. Supp. 837 (S.D.N.Y. 1968). The Court of Appeals reversed in 426 F. 2d 32; a petition for rehearing was denied, 437 F. 2d 957 (1970) and on a petition for writ of certiorari by the Federal Government this Court granted certiorari on May 3, 1971. The same judge that presided over the panel in the Court of Appeals reversing the criminal conviction presided over the panel that heard and decided the instant case in the Court of Appeals.

By February 6, 1969, three attorneys representing thirty-three states, and one other attorney also representing Government entities, had negotiated a settlement offer with the defendants for $100 million. On that same date, the private hospital class was separated from the settlement offer in this case and was made a separate offer of settlement of $20,000,000 to include the Blue Cross Insurance class. The offer was increased to $32,500,000, of which the private hospital class procured $22,000,000. The private hospital class was in the exact same position as the wholesaler-retailer class—both being direct purchasers from the price-fixers and both re-selling to ultimate consumers. The amount of purchases of the private hospital class was only one-fifth of the amount of purchases made by the wholesaler-retailer class of these antibiotic drugs. This separate settlement for the hospital class of $32,500,000 has been approved by the same District Judge, who rendered the decision in the instant case.

On February 6th, 1969, the four CCS attorneys had predetermined allocations to the three classes involved in the settlement offer as follows: $60,000,000 to the CCS class, $37,000,000 to the consumer class and $3,000,000 to the wholesaler-retailer class. One of the CCS attorneys, who negotiated this settlement offer with the defendants and made the predetermined allocation of $3,000,000 to the wholesaler-retailer class was also at that time co-attorney of record in a class action filed in behalf of Steinway-Ford Hopkins, a chain of retail drug stores. Another CCS attorney, who negotiated this settlement offer, after this date filed a national class action suit on behalf of a retail druggist, namely, Sun-Ray Drugs and also later was on the Committee of Counsel for the private hospital class. A Co-Chairman for the Committee of Counsel for the Wholesalers and Retailers was Co-counsel with the CCS attorney in the class action for Ford Hopkins Drugs. Three other members of the Committee of Counsel for the Wholesale-Retailer class were also on the Committee of Counsel for the private hospital class. Another member on the Committee for the Wholesale-Retailer class was also a CCS attorney. On February 6th, 1969, no Committee of Counsel or class representatives yet had been constituted for the wholesaler-retailer class.

The $100 million settlement offer was conveyed to the Court and to the representatives of the wholesaler-retailer class as a total sum without any indication that the allocations to classes had already been determined. That offer was modified on May 9, 1969. By that modified offer, defendants offered an unallocated sum in full discharge of all claims of all three classes. The CCS plaintiffs then amended their complaints to add an alle-

gation "as parens patriae on behalf of all individual consumers in (the State, City, County, or Township) pursuant to Rule 23 of the Federal Rules of Civil Procedure." The Rule 23 notice to all the classes provided for an acceptance of the $100 million global offer or an opting out without any predetermination of allocations to classes, and that notice to the wholesaler-retailer and the "created" consumer class provided for the filing of verified purchase claims by a certain date.

On May 26, 1969, an order was entered providing for the establishment of three classes, namely, CCS, wholesaler-retailer, and consumers. No hearing was held on class representation of the wholesaler-retailer class despite requests to do so. The sole criteria for becoming a wholesaler-retailer class representative was the acceptance of the defendants' overall settlement offer by a party plaintiff or intervenor. The May 26th, 1969, Order also provided that Cities, Counties and States could maintain class actions for consumers as proper representatives of the class. The May 26th, 1969, order also provided for class representatives to prepare drafts of notices to be sent to class members under Rule 23(c) (2). The Court then prepared the notices and by orders filed June 16, 1969, directed said notices to be sent out. The orders in Consumer Class provided for publication on or about July 1st, 1969, in every daily English and Spanish language newspaper in general circulation in the State, giving consumers until August 1st, 1969, to exclude themselves from that class, until August 16th, 1969, to file claims. The notice to consumers also contained this statement: "If you do not make an individual claim by August 16th, 1969, that will constitute an authorization to the Attorney General to utilize whatever money he may recover as your representative for the benefit of the citizens of your State in such manner as the Court may direct."

Notice to the Wholesalers-Retailers under order of Court of June 17, 1969, were mailed on June 19th, 1969, giving to members of that class until August 1st, 1969, to exclude themselves from that class; until August 16th, 1969, to file a claim; a claim form was annexed to the notice. No notice was sent to retail druggists no longer in business as of the date of the said notice and the rights of said retailer druggists were terminated without any notice being given to them by publication or otherwise when all class suits including those class members were dismissed with prejudice.

38,000 claims were filed by Consumers in the amount of $16,500,000.00; 4,100 members of the Wholesale-Retailers Class filed claims in excess of $345,000,000.00.

At this stage, this was a multiclass action in which all the classes had agreed to an overall figure but were then competing for allocations for each class from that total sum to be based, after the filing of claims, on the applicable law and a judicial determination in accordance with Rule 23(e) in the absence of an agreement by all of the parties. Such an agreement was never obtained because plaintiffs-appellants and many other class members never agreed to the proposed plan of allocation designated as the Alabama Plan, which was the plan enforced by the Court as modified by the defendants.

Various plans of allocation were submitted by attorneys for the CCS plaintiffs and a $40 million plan of allocation was submitted by the Committee of Counsel for the Wholesaler-Retailer Class. The defendants elected to submit a modified plan of allocation, modifying one CCS allocation plan, namely, the Alabama Plan, which had been submitted by the three attorneys representing 33 States, who had originally negotiated the settlement of-

er with the defendants and had predetermined the allocations to all three classes prior to any claims being filed, without informing the representatives of the Wholesaler-Retailer Class. The Alabama Plan accepted by the defendants contained these predetermined class allocations. The fact that these class allocations had been determined by the CCS attorneys is reflected in the statements made in the Alabama Plan, indicating that in February of 1969 such predetermined allocation to classes was presented "to almost all CCS entities who had filed suit in order to secure their acceptance of the settlement, and acceptance was procured from virtually all of them on that basis" (Joint Appendix of Appellees in Court of Appeals, page 199). By reason of the withdrawal from the settlement of seven States and several other Governmental entities the total settlement figure was reduced to $82,615,030.00.

When it became apparent that the three million dollar predetermined nuisance allocation to the wholesaler-retailer class would not suffice in view of the $345,000,000 claims filed by that class, it was determined to place the entire fund of $82,615,030 in escrow for thirteen or fourteen months and give the interest for that period for that entire fund to the wholesaler-retailer class, amounting to approximately $8,500,000. Thereafter the plaintiffs-appellants herein requested a hearing by the District Court in regard to the conflict of and the interlocking interests of attorneys representing the various competing classes; the request for such hearing was denied. On March 24-25, 1970, and on other dates thereafter, the District Court conducted hearings on the "settlement" plan and its allocation among the three classes of plaintiffs. On March 25, the plaintiff-appellants herein requested the Court to have a hearing on damages sus-

tained by the wholesaler-retailer class. That request was also denied.

The forty million dollar plan of allocation unanimously fashioned by the Committee of Counsel for the wholesaler-retailer class contained the following analysis of purchases and overcharges on Page 8 of that Plan:

"1. Purchases.

It appears that, based upon the records of the Defendants, the transcripts of the criminal trial and FTC proceedings, and other available information, direct purchases from the Defendants of the products involved during the period July 28, 1954 through November 30, 1966 were as follows:

Groups	Amount of Overcharge	Percent to Groups Shown
Wholesalers and Retailers	$994,822,000	93.0%
CCS Entities	75,000,000	7.0%
Totals	$1,069,822,000	100.0%

If purchases by CCS entities through wholesalers and retailers are included, CCS purchases would come to approximately $121,000,000, or $46,000,000 in addition to their direct purchases."

On Page 10 they indicate the amount of overcharge as follows:

Applying the above overcharges to the purchases of the two groups, the following estimated damage figures would appear to be valid:

Groups	Amount of Overcharge	Percent to Groups Shown
Wholesalers and Retailers	$726,220,000	93.6%
CCS Entities	50,000,000	6.4%
Totals	$776,220,000	100.0%

On June 24, 1970, that Court approved the Alabama "settlement" plan proposed by two of the four CCS attorneys, who had originally negotiated the settlement offer made on February 6, 1969, as modified by the defendants which plan contained the predetermined allocations made by the four attorneys for the CCS plaintiffs prior to the filing of any claims. On that date, the Court filed its Memorandum Opinion. In this Memorandum Opinion the District Court discusses the likelihood of success of all plaintiffs and bases an important part of its decision upon the reversal of the criminal conviction of the defendants. The Court refers at various times in its Opinion to the criminal transcript but fails to note the fact that that criminal transcript reveals that there was no price-fixing at the City, County and State level. In the criminal transcript, the Judge said:

> "I think the heart of the price fixing problem on the evidence as I have listened to it and seen it lies at the retail and wholesale level, not the hospital, CCS and Federal situation." (Cr. R. Trans. p. 5414).

Certiorari has now been granted by this Court in regard to the reversal of the criminal conviction. If this shall result in an affirmance of the criminal conviction the entire structure of the District Court's opinion on this question will fall.

In that Memorandum Opinion the District Court based a finding that there was a uniform mark-up by all retailers nationally on the basis of one affidavit procured and filed by a CCS attorney. The Court ignored many of the contrary communications filed by druggists, and particularly the affidavit filed by representatives of the Kroger Co., one of the largest drug chains, indicating that it, in particular, and chains generally, did not utilize the 66 2/3% markup, which was the subject of the

CCS procured affidavit. On the basis of that affidavit alone, the Court made a determination that this alleged uniform mark-up constituted a cost-plus situation, and that, therefore, the druggists were not injured in their business or property under Section 4 of the Clayton Act.

On September 29, 1970, the Court, pursuant to its Memorandum Opinion, entered final orders dismissing all complaints. In approving the allocations in the modified Alabama Plan the District Court did not consider the claims filed by the wholesaler-retailer class nor base its decision on the applicable law. In that decision the District Court gave standing to sue to the ultimate consumers, who were not direct purchasers from the price-fixers, permitted the State and other Governmental entities to be class representatives under Rule 23 for the individual tort damage claims under the antitrust laws of such individual consumers, permitted these Governmental entities as such representatives, or under a concept of parens patriae, to retain unclaimed funds of that consumer class, and in effect held that wholesalers and retailers, direct purchasers from the price-fixers, were not injured in their business or property under Section 4 of the Clayton Act.

On March 29, 1971, the United States Court of Appeals for the Second Circuit affirmed the ruling of the District Court. The Court of Appeals introduced a doctrine of using pass-on as a means of diminution of damages by other plaintiffs. The Court of Appeals also formulated a theory of assignment by silence of millions of consumers in the face of the competing claims of druggists.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS HAS PRACTICALLY ELIMINATED PRIVATE ACTION UNDER SECTION 4 OF THE CLAYTON ACT AS A VITAL MEANS OF ENFORCING THE ANTITRUST POLICY OF THE UNITED STATES AND, THEREFORE, IS IN CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

By its decision and opinion in the present case, the Court of Appeals for the Second Circuit has practically eliminated the right to sue for injuries to business and property of those direct and initial purchasers who are the only class in the chain of distribution who as a matter of law can effectively enforce the antitrust laws of this Country against price-fixers and monopolizers. The enforcement of national antitrust policy has been lost by this type of judicial legislation. *Perma-Life Mufflers* v. *International Parts Corp.*, 392 U.S. 134 (1968); *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322 (1955); *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743 (1947).

The thrust of the Court's opinion is to strike directly at the basis of the right of direct purchasers of the price-fixers to maintain actions for treble damages under Section 4 of the Clayton Act. This right has been since 1906 affirmed time and again by the Supreme Court of the United States—by Justice Holmes in *Chattanooga Foundry and Pipe Works* v. *Atlanta* (1906) 203 U.S. 390 and in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 351 (1958), by Justice Brandeis in *Louis-*

ville and Nashville Railroad v. *Sloss-Sheffield Co.* (1925) 269 U.S. 217, and in *Adams* v. *Mills* (1932) 286 U.S. 397, and by Justice White in *Hanover Shoe Co.* v. *United Shoe Corp.* (1968) 392 U.S. 481. Justice Holmes' opinions in *Chattanooga Foundry* case and the *Southern Pacific Co.* v. *Darnell-Taenzer* essentially express these legal principles followed by this Court in regard to the private rights under Section 4 of the Clayton Act:

The exaction of the illegal charge injures the purchaser whose costs have been increased, and such inflated costs constitute injury to property within the meaning of the Clayton Act, without regard to whether the purchasers' ultimate profits were concomitantly reduced. Holmes says we do not look beyond the first step, the consumer is too remote, the task would be insurmountable going down the line of distribution—and it is immaterial if there is a windfall to the plaintiff-purchaser—the object is to prevent the wrongdoer from realizing the fruits of his wrongdoing.

The lower Court decisions are in direct conflict with these concepts. They declare that increased costs by reason of the illegal exaction does not constitute injury within the meaning of the Clayton Act, that profits are the criteria, that by reason of these profits the direct purchasers from price-fixers would have a windfall, and these decisions give standing to sue to the remote consumers and then transfer their rights to the public bodies.

For over 65 years of interpretations of antitrust law, this Court has affirmed the private rights of direct purchasers from the violators of the antitrust laws to bring treble damage actions, which rights of private action were crystallized in *Hanover Shoe Company* v. *United Shoe*

Corporation, 392 U.S. 481, where this Court defined the rights of those in the chain of distribution. *Hanover Shoe* has had the impact of giving certainty and direction to the private rights under Section 4 and, also, a comprehension of the rights of those in the chain of distribution. Now the Court of Appeals decision in the instant case has, by being cited as precedent in existing pending antitrust litigation, ended this certainty, thus calling for a re-assertion by this Court of the jurisprudential rationale of its previous decisions defining private rights under Section 4 and the public policy of the enforcement of the antitrust laws by the use of these private rights as a deterrent.

In *Radovich* v. *National Football League*, 352 U.S. 445, 453 (1956), a Section 4 case, the court said:

> "Congress has, by legislative fiat, determined that such prohibited activities (unreasonable restraints of trade) are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public. Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of Section 5 of the Clayton Act. In the face of such a policy this court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

The Supreme Court has noted, in *United States* v. *Borden Co.*, 347 U.S. 514, 518 (1954):

> "The private-injunction action, like the treble-damage action under Sec. 4 of the Act, supplements government enforcement of the antitrust laws; . . . These private and public actions were designed to be cumulative, not mutually exclusive."

The Court of Appeals decision here has made the public action *exclusive* by virtually eliminating the private action under Section 4 of the Clayton Act. It has given to public entities under a hybrid *parens patriae*—Rule 23 representation theory (in conflict with all current court decisions) the *exclusive* right to enforce the antitrust laws.

There are certain obvious hazards in granting to the public bodies the exclusive right of the enforcement of the antitrust laws. This would necessarily involve the representation of one or more citizen groups or entities by the State against other citizen groups or entities for treble damages. This is clearly not a function of a sovereign.

Another hazard would be the foreseeable pendulum concept of antitrust enforcement by the public bodies. Under certain political situations, in accordance with their monetary needs or by reason perhaps of a motivation of political punishment, they might indulge in a process of overkill against political targets. On the other end of the pendulum, by reason of political expedience, there might be a tendency to desist from any antitrust enforcement action against favored corporate entities or against many corporate entities.

The CCS plaintiffs seek to justify this envisaged chaos by asserting that it was done in a settlement context. The facts are that the settlement only pertained to an agreement by all classes to accept an overall figure, but that the case really involved competition between classes for allocations to each class from that fund. In addition, the courts have held that in a settlement of a class action the Court cannot disregard established principles of law. *Cohen* v. *Young*, 127 F. 2d 721 (6th Cir. 1942). The

license to evade legal precedent, which the public bodies seek to create by the settlement misnomer will be explored further herein. This decision is already being widely cited as a precedent in pending antitrust price-fixing litigation.

Certainly, the clear conflict with the United States Supreme Court decisions on this issue and the unquestioned importance of the issue involved with respect to future antitrust precedent and litigation compels the granting of certiorari.

II.

THE DECISION OF THE COURT OF APPEALS IN MISCONSTRUING, MISAPPLYING AND MISCONCEIVING THE SUPREME COURT DECISION IN HANOVER SHOE COMPANY V. UNITED SHOE MACH. CORP. HAS DESTROYED THE CERTAINTY CREATED BY THAT DECISION AND WILL CAUSE CONFUSION IN ALL THE CIRCUITS IN ANTITRUST PRICE-FIXING CASES IN REGARD TO PASS ON, STANDING TO SUE, AND CRITERIA FOR INJURY TO BUSINESS OR PROPERTY UNDER SECTION 4 OF THE CLAYTON ACT.

The lower courts did not comprehend that this Court in *Hanover Shoe*, because the defense of pass-on was specifically pleaded by the defendant, covered the entire history of that alleged pass-on defense and reaffirmed without question the principles enunciated by Justice Holmes and Justice Brandeis, flatly denounced the pass-on theory as a defense—and again reiterated the public policy involved in granting to middlemen or retailers the right of action for treble damages in antitrust viola-

tions and denying such actions to those persons down in the layer of distribution who were remote purchasers from the violators of the Clayton Act. It did so on the basis of the broad policy underlying Section 4 because as it said (p. 494): "Treble damage actions, the importance of which the Courts have many times emphasized, would be substantially reduced in effectiveness."

If this court intended to take a step forward in *Hanover Shoe*, and to crystalize the law and eliminate or even restrict "pass on" as a defense, the lower courts here have digressed radically from that result. Their decisions resurrect pass-on, giving it a new meaning.

The District Court found, by the express language in its opinion, that retailers "passed on" any overcharge to end users, sustained no damage, and "made substantial profits from the antitrust violations." (p. 745). The Court of Appeals adopted the exceptional error of fact of the District Court in finding that the retailers employed a "uniform mark-up over cost" based on an affidavit procured and filed by CCS attorneys which was proven erroneous by the record and then the Court of Appeals further adopted the error of law in the District Court in concluding from this error of fact that this situation was like the "cost plus" contract exception referred to in *Hanover*, without noting that the requirement was for a *contract* and that no contractual agreement existed in regard to the retailers. Such a controlling precedent would remove a vast area of products purchased—and then marketed at the retail store level—from the purview of private antitrust enforcement policy even though the complex economics of the retail business practices are as pertinent to pricing decisions as they were for *Hanover Shoe*.

The immediate consequence of this misapplication is a severe limitation of the *Hanover Shoe* holding by the expansion of the "cost plus" exception to include markups —thus plunging into the economic realm this court sought so carefully to avoid. "Pass on" then acquires a new vitality and loss of profits becomes the sole standard for a determination of standing under Section 4. The application of the "pass on" concept to the instant case inverts *Hanover Shoe* by giving standing to sue to remote consumers and depriving direct purchasers of that right.

Professor Milton Handler in analyzing the *Hanover* decision incisively interprets the standing issue stating:

> " . . . the Court in *Hanover* chose to vest the right of action on the first purchaser who recovers the full amount of the illegal exaction. In short, the Court today, as did Holmes a half-century ago, rests the decision on practical grounds which will facilitate the administration of the antitrust laws by permitting the most likely suitor to recover damages from the wrongdoer . . . Stating the rule in terms of proximate causation, the prices paid by anyone else farther down the line are not, as a matter of law, the result of the wrongdoer's illegal exaction but rather of his victim's independent pricing decisions." 57 Cal. L. Rev. 182, 211-212, "Through the Antitrust Looking Glass," Milton Handler.

The holding in *Hanover* has been followed in all cases subsequent to it—*State of Minnesota* v. *United States Steel Corp.*, 299 F. Supp. 596 (1969), *Philadelphia Housing Authority* v. *American Radiator Corp.*, 50 F.R.D. 13 (1970), and *United Egg Producers* v. *Bauer International*, 312 F. Supp. 319 (S.D.N.Y. 1970).

The "pass on" defense relates to the question of who is an injured person under Section 4 of the Clayton Act,

but has been used by the Court of Appeals here, contrary to the contentions and understandings of *all* parties in the District Court, to act as a set-off against the plaintiffs' measure of damages. Since the wholesaler-retailer class is given only a "nuisance" allocation, the District Court applied "pass-on" to the issue of injury, but the Court of Appeals used it to justify diminution of damages, even though no hearing was conducted on the amount of damages.

The precedent being established in this case results in the insulation of defendants and their retention of the fruits of their illegality contrary to the public policy underlying the antitrust laws.

III.

THE DECISION OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH THE DECISIONS IN COURTS OF APPEALS OF OTHER CIRCUITS ON THE ISSUES OF PASS-ON, THE STANDING OF CONSUMERS TO SUE, COST-PLUS SITUATIONS, AND THIS DECISION WILL HAVE CONTINUING FUTURE CONSEQUENCES IN REGARD TO LITIGANTS IN ANTITRUST PRICE-FIXING MATTERS.

The Court of Appeals decision is in direct conflict with the decisions in the Court of Appeals of other circuits in regard to the standing of consumers to sue and in regard to the pass-on defense. The Court of Appeals here gave standing to sue to remote consumers down in the layer of distribution who were not direct purchasers from the antitrust violators of Section 4 of the Clayton Act and who purchased from those who were victims of these violators, contrary not only to Courts of Appeals decisions in other circuits, but also Supreme Court decisions.

on these matters as discussed above, and to District Court decisions which were not appealed. The lower Court decisions, in fact, are in conflict with a Court of Appeals decision in their own circuit and a district decision in their own circuit on these very issues. In all of the following cited Court of Appeals decisions of other circuits such consumers down in the layer of distribution were denied a right of action under Section 4 of the Clayton Act and the pass-on defense was rejected:

Commonwealth Edison Company v. *Allis Chalmers Manufacturing Company,* 335 F. 2d 203 (7th Cir. 1964);

Mangano, et al. v. *American Standard & Sanitary Corporation, et al.,* 50 F.R.D. 13 (ED. Pa.), aff'd. 438 F. 2d 1187 (3rd Cir. 1971).

On the same issues it is in conflict with Court of Appeals decision and a district court ruling in its own circuit:

Straus v. *Victor Talking Machine Company,* 297 F. 791 (2nd Cir. 1924);

Atlantic City Electric Company v. *General Electric Company,* (1964) 226 F. Supp. 59, app. den., 337 F. 2d 844 (2nd Cir.)

On these same issues it is in direct conflict with other district court decisions in its own circuit and in other circuits.

Ohio Valley Electric Corporation v. *General Electric Company* (1965) SDNY, 244 F. Supp. 914;

United Egg Producers v. *Bauer International,* 312 F. Supp. 319 (SDNY, 1970);

Public Utility District v. *General Electric Company,* 230 F. Supp. 744 (W.D. Wash. 1964);

Philadelphia Housing Authority v. *American Radiator and Standard Sanitary Corporation,* 309 F. Supp. 1057 (E.D. Pa. 1969);

State of Minnesota v. *United States Steel Corporation,* 299 F. Supp. 596 (D.C. Minn. 1969);

State of Hawaii v. *Standard Oil Company of California, et al.,* 301 F. Supp. 982 (D.C. Hawaii, 1969).

That part of the decision in the *Hawaii* case which denied the right of the State of *Hawaii* to represent consumers under Rule 23 was not appealed, although that case is now pending before this Court on the granting of certiorari in regard to a *parens patriae* count of the State in its quasi-sovereign capacity to recover damages to its economy.

In certain cases a direct purchaser from a violator of the Clayton Act as to price fixing may be a consumer—as in *Hanover*— but that direct purchaser is not in the same position as the consumer class in the instant case, who is down the layer of distribution and whom all pertinent law says has no cause of action under Section 4 of the Clayton Act.

The only exception to the rule that the direct purchaser from violators of the antitrust laws have standing to sue is where the plaintiff is the obvious target of the conspiracy. *Armco Steel Corp.* v. *North Dakota,* 376 F. 2d 206, *State of Missouri* v. *Stupp Bros. Bridge and Iron Co.,* 248 F. Supp. 169, *State of Iowa* v. *Union Asphalt Products, Inc.,* 281 F. Supp. 391, *State of Washington, et al.* v. *General Electric Co.,* 246 F. Supp. 960, *State of Washington et al.* v. *American Pipe and Construction Co.,* 274 F. Supp. 961. See also *S. C. M. Corp.* v. *Radio Corporation of America,* 276 F. Supp. 373 (S.D. N.Y. 1967)

aff'd. 407 F. 2d 166 (2nd Cir. 1969), *Fields Productions, Inc.* v. *United Artists Corp.*, 432 F. 2d 1010 (2nd Cir. 1970). As to whether the plaintiff's injuries were direct or indirect, see *Conference of Studio Unions* v. *Loews, Inc.*, 193 F. 2d 51 (9th Cir. 1951) *cert. den.* 342 U.S. 919 (1952), *V.T.R.* v. *Goodyear Fire and Rubber Co.*, 303 F. Supp. 773 (S.D. N.Y. 1969). But never has any court until the instant case given standing to sue to remote consumers down in the layer of distribution purchasing in a free and unrestrained market where the independent pricing decisions of others intervened.

The lower courts here have created confusion as to standing to sue by, first, *restrictively* construing the words "business" and "property" in such a way as to limit the availability of this civil antitrust remedy to those persons traditionally charged with enforcing the deterrent effect—wholesalers and retailers—and thereby weakening the effectiveness of the treble damage action as a means for enforcing national antitrust policy, and, by second, generously and improperly expanding the words "business" and "property" to include consumers down in the layer of distribution using as its theory a hybrid *parens patriae*—Rule 23 combination, to give to CCS entities the right to represent such consumers, and then retain these consumers' allocated damages.

The decision of the Court of Appeals here on the question of cost-plus situations is in conflict with the Court of Appeals decision in other circuits. The conflict derives from the fact that the decisions in the other circuits are based on the fact that there was a cost-plus *contractual* guarantee to the plaintiffs, whereas in the instant case there was no cost-plus contract of any kind, the Court of Appeals based its decision on a contrived cost-plus

concept premised on an erroneous assumption of uniform mark-up. This erosion of the law creating confusion as to what the cost-plus exception is intended to be, requires that this Court make a positive pronouncement in regard to the cost-plus situation as it relates to the full spectrum of pass-on.

In this area it is to be noted that in the *Ohio Valley Electric Corporation* v. *General Electric Company,* 244 F. Supp. 914, Judge Feinberg permitted recovery by a plaintiff purchaser even though there was a contractual guaranty cost-plus situation on the basis of an interpretation that Section 4 of the Clayton Act permits recovery by reason of "increased costs of doing business" due to the illegal exaction regardless of whether there is a concomitant loss of profits. The *Ohio Valley* decision was approved in *State of Minnesota* v. *United States Steel Corporation,* 299 F. Supp. 596, which declared that the result in the *Ohio Valley* case was sound and had not been impliedly overruled by the *Hanover* decision.

Again this calls for a positive pronouncement by this Court in this area.

IV.

THE DECISION OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH THE DECISION OF THE COURT OF APPEALS OF THE SIXTH CIRCUIT HOLDING THAT A COURT IN APPROVING A SETTLEMENT IN A CLASS ACTION MUST FOLLOW SETTLED PRINCIPLES OF LAW; THIS INVOLVES THE CONSTRUCTION OF RULE 23(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND REQUIRES THE EXERCISE OF THE SUPERVISORY POWERS OF THIS COURT TO SET UP THE STANDARDS FOR THE LOWER COURTS IN THE PERFORMANCE OF THEIR DUTIES TO ABSENT MEMBERS OF A CLASS UNDER RULE 23(e).

The Court of Appeals decision is in direct conflict with the decision of the Court of Appeals of the Sixth Circuit which holds that in considering the approval of a compromise or settlement, the Court, in a class action, must follow settled principles of law. In *Cohen* v. *Young*, 127 F. 2d 721 (6th Cir. 1942), that Court said:

> "The exercise of discretion does not permit the court to disregard the substantive principles of law established for the protection of litigants. One of these principles is that judgments and decrees which make findings of fact shall be founded on evidence." (p. 726)

The Court further delineated a Court's duty under Rule 23:

> "The appellant had a right to invoke the discretion of the court to decide whether the compromise recommended did in fact protect the interest of the corporation and of the stockholders. It was the duty of the court to consider the available evidence in

> this light, and its refusal or failure to consider it on the ground that it had no power or discretion so to do deprived the appellant of a substantial right. . . . *under the circumstances here presented. Rule 23(e) does not justify approval of a proposed compromise of a class action solely upon the recommendation of attorneys even though they represent all parties of record.*" (emphasis added) (p. 725)

The discretion vested in the trial court was abused with a result that is simply not just and proper to the interests of all parties. As in *Cohen* v. *Young*, 127 F. 2d 721 (6th Cir. 1942), the District Court erred because it relied almost solely upon the recommendations of attorneys, failed to consider or evaluate affidavits proffered by appellants and others on relevant points, failed to give full consideration to the facts by refusing to hold a Rule 23 hearing when demanded by facts alleged and by some of the parties, disregarded established law, and either made findings of fact not founded on evidence or made no findings whatever but nevertheless based its opinion of the law from facts implicitly found—all to the detriment of one class (wholesalers-retailers) and the benefit of another class (CCS).

The Court has a duty in a settlement context to uphold precedent and public policy and cannot permit litigants in a settlement context to arrogate to themselves rights they are denied by the mandates of the Supreme Court of the United States. This is the reason for Rule 23(e) of the Federal Rules of Civil Procedure, requiring the approval of the Court in class action compromises, to protect the interests of absent members of the class—to see that the settlement does not violate precedent or public policy. The Court's obvious failure in this area constitutes an abuse of discretion, and requires reversal

to prevent the chaos that is resulting and will result from this decision being cited as a precedent in anti-trust cases.

The lower courts here failed to comprehend that in a class action or multi-class action, the court's duty to the absent members of the class and its responsibility as a party to the compromise connotes a litigable context to that phase of a class action. This could not be more applicable than in a multi-class action where the classes have agreed to an overall settlement fund but are competing for allocations of that fund to their respective classes and are relying on the court to properly exercise its function under Rule 23(e) and to perform its duties to the absent members of the classes; and, in fact, the District Court gave assurances that this would be done. The failure by the Court to keep these assurances denied to the classes to whom it was made and who were affected by this failure, their constitutional right to opt out thereafter.

The court said in *Percodani* v. *Riker-Maxson Corp.*, 14 FR Serv 2d 583, 586-7, in describing its role that:

> "In determining whether or not to approve a proposed settlement, a court should not try disputed issues of law and fact." . . .
>
> "But the court is also mindful of its responsibility to act as guardian for those absent parties who are to be affected by this litigation as well as its responsibility to those objectants now before it.
>
> "In the actions at bar, the burden of proof lies with the proponents of the settlement. They must show that the proposed compromise is fair and reasonable in light of the damages sought by plaintiffs and the likely result of victory as compared with the amount of the settlement offered. *Norman* v. *McKee*, 290 F. Supp. 29 (ND Cal., 1968), aff'd 1970 CCH

> Fed. Sec. L. Rep., ¶ 92,800. This burden has not been met."

In *Norman* v. *McKee*, 290 F. Supp. 29 (N.D. Cal. 1968) aff'd. 431 F. 2d 769 (9th Cir. 1970) the Court said:

> "Rules 23(e) and 23.1, FR Civ P, provide that an action brought under those rules 'shall not be dismissed or compromised without the approval of the court.' The reason for the requirement is obvious. Because the rights of many persons are at stake who are parties to the action only through their representative, a settlement negotiated between the named parties may not give due regard to the interest of those unnamed. *Cohen* v. *Young*, 127 F. 2d 721 (6th Cir. 1942). . . . The district judge properly understood his responsibility was to act as guardian of the absent parties. . . ." (p. 774)

The defendants here in the litigating antibiotic cases cite the same law as these appellants and take the same position. In a claims case, where different classes are competing for allocations from the same overall fund which they have agreed to accept, is there different law that the court applies—or no law at all? Is there no duty by the Court to absent members of the classes to apply the existing law to the facts? The answer is too obvious to need expression.

The class action has an important function to play in law—it can be an important tool in the attainment of justice. But it depends upon an alert court, in control of the situation, carrying out its duty to absent members of the class, to enunciated public policy and to legal precedent and upon honest capable attorneys, representing only the interest of their class and seeking remuneration based on lawful achievement for the class and the clients they represent. This is absent in the present litigation.

One of the most important elements of this case is to clean up this situation of professional class attorneys preying upon everyone, representing different classes competing for the same fund, creating spurious concepts contra to existing law, such as the hybrid *parens-patriae* Rule 23 representation here, for the purpose of procuring larger fees for themselves, and exchanging favors and offering inducements to representatives of other classes to rubber stamp the illegal bargains they have made. It is essential that this house-cleaning be done here by this Court if class actions are to survive as useful adjuncts to the administration of justice. It is necessary for the court to exercise its supervisory powers in this important area, to prevent the appearance of and opportunity for collusive settlements.

Where the appearance of or opportunity for collusion (whether or not it in fact exists) is fostered in this type of settlement, the occurrence of other appeals and the consequent opportunity of this Court to establish standards in this area would be very unlikely. A class representative normally would not appeal such a class settlement. A class member would be sorely discouraged from any appeal of similar matters if this case is allowed to stand.

The argument in law that defendants can give their money to anyone regardless of its legal effect on others cannot be substantiated in a case where different classes have agreed to an overall figure, and then have filed claims and are competing for allocations from the overall fund, based on the applicable law and facts. This is especially true where the court has ignored the applicable facts and law to the detriment of one of the competing classes. In the instant case the $100,000,000 overall set-

tlement offer would never have been accepted by the class who were the direct purchasers from the violators of the antitrust laws, and who had over $700,000,000 in overcharges and $345,000,000 in filed claims unless the allocations to classes were to be based on the claims filed and the applicable law. And this very class is the class that the defendants in the litigating antibiotic cases assert had all of the rights in the chain of distribution.

The lower courts' decisions substantially change the functions of the court in Rule 23 proceedings and remove the safeguards for vigilant protection afforded to absent class members by the courts. The impact on multi-class action litigation now flourishing is too critical to deny to all litigants a much clearer definition of judicial responsibility under Rule 23(e). The District Court's misconception of its role in these cases compels the exercise of this Court's supervisory functions to clarify the meaning, scope, and intent of Rule 23(e) hearings for guidance to courts in future settlements of complex antitrust litigation.

Petitioners submit that the legal device employed to effectuate this "settlement" is a matter of monumental national importance to present and future antitrust litigation, and unless reviewed will severely hamper if not totally eliminate those classes of litigants who have the most direct and immediate actions, if not the exclusive actions, under Section 4 and who have traditionally been the major deterrent to price-fixers.

Since new Rule 23, virtually all class action antitrust cases have resulted in settlement. It is, therefore, essential, to prevent the further proliferation of massive litigation by all classes of prospective litigants in the chain of

distribution of commodities price-fixed at the manufacturing level, that this Court define the respective rights of all classes of claimants and clearly indicate that settled principles of law must be followed in so-called "settlement" cases, particularly in multi-class recoveries where all classes are before the same court, and particularly where these classes are competing for the same fund. This is another important reason why certiorari should be granted in this particular case involving a construction of a rule of Federal Civil Procedure, namely Rule 23(e).

V.

THE DECISION OF THE COURT OF APPEALS IN CONSTRUING RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE GRANTED TO THE STATES THE RIGHT TO REPRESENT INDIVIDUALS WITHIN THEIR BORDERS IN REGARD TO THEIR TREBLE DAMAGE CLAIMS FOR ANTITRUST VIOLATIONS UNDER SECTION 4 OF THE CLAYTON ACT CONTRARY TO ALL EXISTING PRECEDENT. THIS REQUIRES THIS COURT TO DEFINE THE SAFEGUARDS SET UP BY THE FRAMERS OF THE NEW RULE 23 IN ORDER TO PREVENT THE FEDERAL COURTS FROM BEING INUNDATED WITH ACTIONS BY PUBLIC ENTITIES.

The decisions of the lower Courts in this case have resulted in the creation of a new right contrary to existing authority. This is the right of Cities, Counties and States to represent consumers as a class representative for their individual claims for damages under Section 4 of the Clayton Act. The precedent created by these decisions is now being applied in other settling and litigating cases,

including litigating antibiotic cases in the Southern District Court of New York (M-19-93-A).

The litigating antibiotic cases include actions by seven States that opted out of the global settlement.

In the litigating cases the District Court has established the States as Rule 23 class action representatives of the consumers within their borders for their individual claims under Section 4 of the Clayton Act.

Previous attempts by States to assert claims of consumers for treble damages under Rule 23 were repudiated in the plumbing anti-trust cases. In *Philadelphia Housing Authority* v. *American Radiator and Standard Sanitary Corp., Inc. et al.*, 309 F. Supp. 1057 (EDPa 1969). Judge Joseph S. Lord, III found "no support in the authorities for such a suit," that there was not even a "substantial amount of conflicting authority," and that such suits were "totally without legal support" so that the allegations were "frivolous."

As to Rule 23 the Court said:

> "But the writers of the revised Rule 23 weighed the problems of manageability, fairness, and judicial economy in establishing requirements therein, and the Court agrees with defendants that to allow a plaintiff State to recover damages for individual claimants in a substitute type of representative suit without the safeguards there provided would undermine the aims of that Rule." (at page 1063)

In rejecting a new type of Rule 23 representation for CCS entities, which is being molded in the present case, Judge Lord observed the difficulty of providing notice and other safeguards to absent class members, and said:

> "Similarly, there would be no assurance that the claim of the representing State (in its proprietary capacity, if any) or of any class member would be

typical of the claims of all or most of the members, or that the common issues of law or fact predominate over those which affect individual members, as would ordinarily be required under Rule 23. It would seem to this Court that without at least these aspects of the requirements of Rule 23, manageability of extraordinarily complex litigation like the present cases would be eliminated. *And of course it would be entirely unreasonable to expect this or any other Court in the context of the particular litigation before it to frame an entirely new structure of the detailed type set forth in Rule 23 for ordinary class actions, for the handling of 'parens patriae' cases.*" (emphasis added, p. 1062)

It should be noted that the *State of Hawaii* case, in which certiorari was granted by this Court (Point VII, *post* p. 52) contained an additional count (III) in which the State in a representative capacity was seeking damages on behalf of individual consumers as a class under Rule 23. Notwithstanding the fact that the State of Hawaii appealed the "parens patriae" Count and thereby had a free vehicle for consideration of Rule 23 representation, it chose not to submit this issue to the scrutiny of the Court of Appeals or the Supreme Court.

States have also filed class representation suits on behalf of consumers in the Ampicillin antitrust litigation pending in Washington, D.C. In both the Ampicillin and antibiotic cases, private actions were on file claiming class representation for consumers so that consumers would have had the benefit of claiming any rights afforded by law without the need for the assumption of such representation by the States.

As is discussed elsewhere in this Petition our position is that consumers have no standing to sue as remote purchasers and are not entitled to damages and therefore any

class representative of theirs would also not be entitled to damages.

Both the Third Circuit Court of Appeals and the District Court in Philadelphia have denied rights of the consumer as ultimate purchaser to recover from the manufacturer. (*Mangano, et al.* v. *American Radiator and Standard Sanitary Corp., et al.*, 50 F.R.D. 13, aff'd. 438 F. 2d 1187 (3rd Cir. 1971)).

Rule 23 representation by states can create a very attractive plum for states hungry for revenue who may seize upon such opportunities as means of retaining such recoveries.

If a class representative is allowed to keep the class members' money, as in the instant case, the limits of such representative's rights and obligations should be defined so private litigants will know where the rights of their class end and state's rights accrue. Any retention by the state as class representative of unclaimed funds of individual members of that class is *parens patriae,* no matter what it is labeled. If Rule 23 is intended to be more than a rule of procedure (see *Harris* v. *Palm Springs Alpine, Inc.*, 329 F. 2d 909, 912-13 (9th Cir. 1964) and *Snyder* v. *Harris*, 394 U.S. 322, 336 (1969)) then it must be re-examined against the traditional concepts of due process against which class notices are tested. This Court pointed out in *Snyder* that the procedural provisions of Rule 23 cannot alter substantive legal requirements. Moore, Federal Practice, Sec. 23-82.

The states in their proprietary capacity as purchasers seeking recovery for their share of the damages out of the global settlement are in conflict with the claims of states as representatives of the individual consumers for

their damages. Another conflict between the states and the consumers was recognized in the May 4, 1971, opinion of Judge Miles Lord in the litigating antibiotic cases where even the litigating states acknowledged such conflict existed. At page 2, the court states:

> "An initial problem, which must be faced before considering the management and notice questions, concerns the status of residents within the states who purchased or paid for broad spectrum antibiotics from public or private hospitals during the period in question. In their responses to Class Action Order No. 71-5, six states have said they do not understand the class defined by that order to include this category of class actions. The basis for their position is a potential conflict between the claims of this 'hospital patient' group and the claims of public hospitals, which are part of the government entity class represented by the same states pursuant to Class Action Order No. 71-4."

Judge Lord goes on to state the duty of the Judge is to protect the absent members of the classes:

> "In view of the state's reluctance to represent a group of claimants arguably within their class, it might be simplest to amend the definition of the class to exclude that group. However, Rule 23 charged the judge with a duty to protect the interest of absent class members, see, *e.g., Schwartzman* v. *Tenneco Mfg. Co.,* 319 F. Supp. 1278, 1281 (D. Del. 1970), . . ."

At least this much conflict is acknowledged by the courts and the states. Certainly as much conflict existed in the "settling" cases. This conflict does not permit the state to serve as a class representative. *Clark* v. *Chase Nat. Bank of City of New York,* D.C. N.Y. 1942, 45 F. Supp. 820. See also, *Molina* v. *Sovereign Camp,* W.O.W. D.C. Neb. 1947, 6 F.R.D. 385, which held that under the

rule requiring that a class action be maintained by a representative who will fairly insure the adequate representation of all, such action may not be maintained by a representative of a class holding other interests in conflict with interests of the class, since such representation would not afford to absent parties the protection required by "due process of law."

It was also held in *Pacific First Ins. Co.* v. *Reiner*, D.C. La. 1942, 45 F. Supp. 703, that a suit is not truly a "representative suit" merely because the plaintiff so designates it, and whether it is, depends upon the attending facts.

Another Court of Appeals case has taken a similar position that an existence of a conflict will not permit functioning as a class representative. There is no "representation" sufficient to support a class action when there is antagonism of interests within the alleged class as to the subject matter of the suit. *Redmond* v. *Commerce Trust Co.*, CCA. Mo. 1944, 144 F. 2d 140, certiorari denied, 323 U.S. 776, rehearing denied, 323 U.S. 819.

This creates a clear conflict of decisions between those Circuits and the Second Circuit in the instant case on this point.

Even if *parens patriae* or Rule 23 representation permitted total representation of all consumers of a product for the indirect benefit of all citizens of a state, city or county, *parens patriae* and Rule 23 representation do not allow selective representation of some groups within a state against other groups in the same state. If the Attorney General of a state owes a common law, statutory or constitutional duty to anyone to represent them in pursuit of recovery of individual tort or statutory claims, he owes a duty to everyone. He cannot pick and choose and select which group of private citizen claimants

he will institute proceedings for, and work to the detriment of other citizen claimants of his state. The presence of a conflict between groups of citizen claimants of a state is a conflict so material and critical that the only logical conclusion from this premise is that the attorney general can represent no one in a contest among competing classes of citizen claimants.

The Supreme Court said long ago in *New Hampshire* v. *Louisiana*, 108 U.S. 76, 91 (1882), "the giving of the direct remedy to the citizen himself was equivalent to taking away any indirect remedy he might otherwise have claimed, through the intervention of his State, upon any principle of the law of nations." That case involved the assumption of the collection of claims of a state's citizens.

Who can believe that states pressed with economic budget problems will consistently try to return money to consumers that they would otherwise keep in one fashion or another, e.g., make a claim so difficult that it is not worth the bother of the claimant to make an application.

There is no law that permits the sovereign to arrogate to itself the law, and to pass a little on to *some* few cities and counties, in the name of consumers. So blatant a disregard of law is present here that in the name of a class and as class representatives some nine cities and counties having absolutely no direct compensable purchases of the products in suit, are recovering and keeping the classes' money.

No court has ever before granted a right to a state to represent its individual citizens for their individual damage claims under Section 4 of the Clayton Act under any theory of law—and until the lower courts' decisions here such a right has been consistently denied by all courts. The new tool, namely Rule 23, is a procedural

rule and cannot grant substantive rights where none existed—and thus cannot give standing to sue to remote consumers who have always been denied such standing. The lower court's decisions have erroneously given standing to sue to such remote consumers and then disregarding all the safeguards set up by the framers of new Rule 23, have given the states a right to represent such remote consumers—where such states had antagonistic interests to said consumers by competing for the same fund.

The lack of limits ensuing from such cumulative error is demonstrated by the fact that the lower Courts' decisions then permit the states as such representatives to retain the unclaimed funds of the class members they purport to represent. Certainly this requires the exercise of the supervisory powers of this Court and the construction of Rule 23 of the Federal Rules of Civil Procedure.

VI.

THE LOWER COURT DECISIONS UNDER THE DOCTRINE OF PARENS PATRIAE GRANT TO STATES AND OTHER GOVERNMENTAL ENTITIES THE RIGHT TO REPRESENT INDIVIDUAL CITIZENS WITHIN THEIR BORDERS FOR THEIR INDIVIDUAL TREBLE DAMAGE CLAIMS FOR PRICE-FIXING UNDER SECTION 4 OF THE CLAYTON ACT AND PERMIT THE STATES AND GOVERNMENTAL ENTITIES TO RETAIN FOR THEMSELVES THE UNCLAIMED FUNDS OF THESE INDIVIDUALS, CONTRARY TO THE DECISIONS OF THIS COURT AND ALL OTHER EXISTING PRECEDENT. PENDING LITIGATION IN THE FEDERAL COURTS REQUIRES A CLEAR EXPRESSION FROM THIS COURT ON THIS SUBJECT BECAUSE OF THE IMPORTANCE OF THE ISSUES INVOLVED.

The lower court decisions under the doctrine of *parens patriae* in granting the States the right to represent in-

dividual citizens within their borders for their treble damage claims for price-fixing under Section 4 of the Clayton Act are in direct conflict with the principle enunciated in a long line of Supreme Court decisions. The states have had rights on the basis of *parens patriae* to protect their quasi-sovereign interests in actions for injunctive relief and not for damages, *Louisiana* v. *Texas*, 176 U.S. 1 (1899); *Missouri* v. *Illinois*, 180 U.S. 208 (1901); *Kansas* v. *Colorado*, 185 U.S. 125 (1902), *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923). However, the States have been prohibited from seeking relief in the Federal Courts on behalf of the interests of private persons. *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1883); *Oklahoma* v. *Atchison, Topeka and Santa Fe Railways*, 220 U.S. 277 (1911).

There have been only three cases dealing with the State's capacity to sue as *parens patriae* under the antitrust laws; *Georgia* v. *Pennsylvania Railroad*, 324 U.S. 439 (1945); *State of Hawaii* v. *Standard Oil of California*, 301 F. Supp. 982 (1969), *Philadelphia Housing Authority* v. *American Radiator and Standard Sanitary Corp.*, 309 F. Supp. 1057 (1969). In all three cases the courts held that the States do not have the right under *parens patriae* to sue for the damages sustained by their individual citizens for violation of the antitrust laws. In *Georgia* v. *Pennsylvania Railroad*, this Court only considered the proprietary and quasi-sovereign claims of the state although there was a count for representing the citizens of the state who had allegedly been overcharged. Injunctive relief was claimed and while the court perhaps left open the question as to whether damages can be procured for *parens patriae* claims based on the quasi-sovereign interests, the Court disclaimed any

deviation from its earlier decisions, all of which had limited the scope of *parens patriae* by prohibiting suits by states for the benefit of individual citizens for damages.

The lower court in *Hawaii* v. *Standard Oil Company, supra,* said the following:

> "Thus the state's *parens patriae* claim cannot be a disguised attempt to recover damages on behalf of the state's individual citizen-claimants. It is not a substitute for a class action under Rule 23, Fed. R. Civ. P. The *two theories for recovery* of damages are separate and distinct. . . . So, here, the State in the guise of *parens patriae* cannot recover for the individual and several possible damage claims of its many citizen-consumers of petroleum products." (301 F. Supp. 982, at 986)

In the *Philadelphia Housing Authority* case, *supra,* the Court refused to devise a whole new set of rules to accommodate *parens patriae* recovery under Rule 23, and emphasized the problems and evils attendant to granting the relief sought by the public bodies.

The State Complaints seek relief "as *parens patriae* on behalf of all individual consumers in the State . . ." The right first asserted was a *parens patriae* right. The right maintained throughout the initial notice and claims proceedings was a *parens patriae* right. The contest over allocation contained in all proceedings embodied in the notices was in such a capacity. Yet, after *Philadelphia Housing Authority* v. *American Standard,* 309 F. Supp. 1057, (E.D. Pa. 1969) and *Hawaii* v. *Standard Oil,* 301 F. Supp. 982 (D. Hawaii, 1969) were decided, the states' theories changed but not their complaints.

Such a similarity in consequence between *parens patriae* and a hybrid *parens-patriae*—Rule 23 combina-

tion is again confirmed by the failure of CCS plaintiffs to amend any of their complaints and amended complaints to abandon the *parens patriae* theory of recovery. The subsequent belated attempt to forget that theory does not comport with the facts and is unavailable in class action litigation after all classes have relied and acted on that theory of *parens-patriae* and notices have gone out, and parties, both adverse and in support of that theory, have acted to their detriment in reliance thereon.

That commentators attribute a *parens patriae* concept to this instant case, see Handler, "The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review", 71 Col. L. Rev. 1 (1971) at page 13:

> "In view of this uncertain ancestry, one might wonder about the sudden popularity of *parens patriae* as an antitrust vehicle. The answer appears to be that the device was utilized in *West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D. N.Y. 1970) . . ."

The claim by the states that they were not proceeding under *parens patriae* and the conclusion of the Court of Appeals of Second Circuit that this was so is belied by the fact that the states were to procure unclaimed consumer monies which were to go into different funds within each state, such as the Public Health Fund in Illinois and the Abandoned Property Fund in New York State. No representative of a class can procure damages belonging to the individual members of the class, so therefore this procurement of unclaimed consumer funds has to be based upon *parens patriae*.

Judge Miles W. Lord, the Minnesota Justice assigned to the antibiotic litigation cases in the Southern District Court of New York, in an opinion dated May 4, 1971,

delineates the distinction in disposition of unclaimed funds between *parens patriae* and Rule 23 representation:

> "The state, as *parens patriae,* would not be acting as a Rule 23 representative of others similarly situated but as a sovereign on behalf of its citizens. The most significant consequence of this difference concerns the award of damages proven by the state/representative party but unclaimed by individual citizen/class members. The *parens patriae* doctrine would apparently require that all such amounts be given to the state for administration for the benefit of the absent citizens. Rule 23 does not require that the class representative be so rewarded . . ."

The only damage recovery authorized by the federal antitrust laws is the specific damage for injury caused to *each person.* There is no provision for damages to any *class* of persons as a *class.* While the computation of damages for injury suffered by each person may have to be flexible, rather indefinite, and rely on statistics, the end result must be a determination of the amount of damages to be awarded by a verdict to *each person.*

There is no provision in the law for assessing damages against defendants to be paid into some fund, regardless of the use to which the fund may be put.

Also revealed by any analysis of the instant case is the extension of *parens patriae* by superimposing Rule 23 upon it to create a new type of recovery, called "the class action supplement," created and applied without the body of law safeguarding the use of either *parens patriae* or Rule 23, and introducing a significant change in Section 4 of the Clayton Act. These modern theories of theoretical applications of the *parens patriae* concept for this purpose or the class action supplement are based on a rationale that direct purchasers from the violators

of the antitrust laws have no standing to sue, which, of course, is contrary to all existing precedent.

Any necessity for a *parens patriae* concept or a class action supplement is eliminated in a case where those recognized traditionally to have independent rights under the antitrust laws are available to sue and are vigorously enforcing those rights. As California, Hawaii and other states as amicus curiae urged in the Court of Appeals, and as is true in *Hawaii* v. *Standard Oil,* the underlying rationale justifying the concept of state class recovery for consumers is the absence of other plaintiffs who can effectively enforce the antitrust laws against price-fixers and disgorge their ill-gotten gains. Such an absence is the *sine qua non* for expanded state actions on these theories. Such a conditional precedent is absent here, in view of the fact that the wholesaler-retailer class, as direct purchasers from violators of the antitrust laws, are present here with standing to sue substantiated by *Hanover Shoe* and all other precedent.

Both the California class action supplement theory and the North Carolina receiver ad litem theory proceed on the false assumption that the direct purchasers from the violators of the antitrust laws have no standing to sue. When this is considered, it then becomes apparent that the instant case now being cited as precedent in all class and multi-class actions has virtually eliminated the private right to sue under Section 4 of the Clayton Act.

This court has an opportunity in these cases to distinguish between rights granted under Section 4 to the public sector under the theory of *parens patriae,* or as treated in the courts below, "the class action supplement." If in fact Rule 23 is an independent theory of recovery, this court should clarify a result which ap-

proves the assignment of each individual's *personal* claim under Section 4 to the class representative by virtue of a class notice published once in daily newspapers in 43 states.

This Court should clarify that no case requiring judicial approval under Rule 23 (e), whether settlement, contest, or the unique combination of the two affected here can deviate in so many ways and so radically from all existing concepts of law.

VII.

CERTIORARI WAS GRANTED ON MARCH 2, 1971, BY THIS COURT IN HAWAII V. STANDARD OIL, 431 F. 2D 1282 (9TH CIR. 1970) IN REGARD TO THE RIGHT OF A STATE TO UTILIZE THE REMEDIES PROVIDED BY THE FEDERAL ANTITRUST LAWS IN MAINTAINING AN ACTION AS PARENS PATRIAE FOR INJURIES TO THE STATE AND ITS ECONOMY AS A RESULT OF A PRICE FIXING CONSPIRACY; THE INSTANT CASE GIVES THIS COURT AN OPPORTUNITY TO COVER THE ENTIRE AREA OF PARENS PATRIAE CONCEPTS AND TO UNEQUIVOCALLY REAFFIRM ITS PRONOUNCEMENTS THAT STATES CAN NOT REPRESENT THE INDIVIDUAL CLAIMS OF ITS INDIVIDUAL CITIZENS UNDER ANY FORM OF REPRESENTATION, AND IF IT DOES NOT DO SO PERVASIVE ERROR WILL BE CUMULATING IN PENDING LITIGATION IN THE LOWER COURTS.

Confirmative of the rationale for granting certiorari in this case is this Court's grant of certiorari in *State of Hawaii* v. *Standard Oil*, 431 F. 2d 1282 (9th Cir. 1970).

Not only are the reasons for the grant applicable here, and even more so, but the fact that this court desires to examine the entire area of *parens patriae* recovery by states under Section 4 of the Clayton Act makes the instant case essential to full consideration of the scope of use, and potential use, and abuse, of the right of states (and in our case cities, counties, and townships) to sue for recovery of private statutory tort claims of their citizens and to reap the benefits of consumer class recovery. The assurances of the *State of Hawaii* that by granting it *parens patriae* status against the oil companies such a remedy will not thereby become *commonplace* is denied and directly contradicted by the commonplace occurrence of *parens patriae*, called Rule 23 recovery in this case—in 43 states (and cities, counties, and townships).

What has been forged below is a destructive new weapon by public entities, fashioned in a manner that undermines the rights of persons best able to carry out the public policy of deterring the defendants from antitrust price-fixing violations. The effect of state recovery measured by total statistical consumer damages has ruinous consequences—overkill—that deserve immediate attention and curbing.

There is a material difference between the parens patriae Rule 23 representation concept in the present case and the assertion of Hawaii in its petition for writ of certiorari in *Hawaii* v. *Standard Oil Co., supra*, that the State of Hawaii should be permitted to maintain its action under Section 4 of the Clayton Act, not as representative of the individual tort damage claims of its citizens, but for damage to its economy where a substantial portion of its citizenry is affected. The failure

of Hawaii to appeal an adverse decision on Rule 23 representation by the State of the individual tort claims of the individual consumers is confirmative of this fact. Certainly when a State can retain the alleged overcharges and damages to its citizens, that is really a *parens patriae* representation of the individual tort damage claims of its citizens.

Hawaii's complaint alleged that the State:

> ". . . brings this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as parens patriae, trustee, guardian and representative of its citizens, to recover damages . . ."

Hawaii's contention in its petition for writ of certiorari is that this Court in *Georgia* v. *Pennsylvania Railroad*, 324 U.S. 439 (1945) left open the question of whether a State in its quasi-sovereign capacity could procure damages as well as injunctive relief in regard to damage to its economy and that the damage to the economy under Section 4 of the Clayton Act is injury to its property. This is a far cry from a State representing its individual citizens, consumers or otherwise, in their individual tort damage claims under Section 4 of the Clayton Act, and the State of Hawaii specifically indicated that this is not what it was seeking since it did not appeal the dismissal of Count III of its complaint, which was a class action as trustee or representative of its consumers who suffered individual injury such as occurred in the instant case.

Petitioners' petition for a writ of certiorari should be granted in the present case, within the same scope encompassed in *Hawaii* v. *Standard Oil Co.*, cert. granted March 2, 1971, in order to provide this Court an opportunity to eliminate the confusion and inconsistencies proliferated in the lower courts. The true expansive scope

of the use of the *parens patriae* Rule 23 combination and its obvious impact on future antitrust litigation by commonplace use must be forcefully rejected by this court or if not, re-articulated to comprehensible proportions.

A definition of the "victims" of the forbidden practices under Section 4 and of who are included as the "public" as opposed to other lesser groups of persons with standing to sue should be clarified in view of the treble damage, injunctive aspects, and criminal sanctions comprising the entire scheme of our antitrust laws. See *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948); *Radovich* v. *National Football League*, 352 U.S. 445, 453-454, (1957), *Hanover Shoe Co.* v. *United Shoe Mach. Corp.*, 392 U.S. 481 (1968), and *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co*, 315 F. 2d 564 (7th Cir. 1963) *cert. den.* 375 U.S. 834, denying consumers intervention in the electrical price-fixing treble damage actions.

VIII.

THE GRANTING OF CERTIORARI BY THIS COURT IN THE CRIMINAL ANTIBIOTIC CASE WOULD, IF THE CONVICTION IS AFFIRMED, MAKE AN IMPORTANT PART OF THE STRUCTURE OF THE LOWER COURTS' OPINIONS UNSUSTAINABLE.

On May 3rd, 1971, this Court granted certiorari on a petition for writ of certiorari by the Federal Government appealing the reversal of the criminal conviction of three of the five defendants herein by the Court of Appeals of the Second Circuit *United States* v. *Chas. Pfizer, et al.*, 437 F. 2d 957 (1970). An important part of the structure of the District Court's opinion in relation to likelihood of success was based on the reversal of the criminal

conviction of the defendants. If this criminal conviction is affirmed, then the rationale of the lower court's decision affirmed by the Court of Appeals, is unsustainable. This is further buttressed by the fact that the criminal record and the judge that heard the criminal case indicated that there was no price-fixing at the city, county and state level. The affirmance of the criminal conviction will thus create more than reasonable doubt that the CCS class is entitled to recover any amount—let alone 87% of the total settlement offer which they are recovering here.

This Court should examine the largest single settlement in antitrust history in light of two irrefutable occurrences, namely, the existence of a conspiracy to fix prices at the wholesaler-retailer level *only* and not at the CCS market level, as established in the criminal trial now on certiorari in this Court, and the same District Court's approval of the private hospital-Blue Cross settlement with these same defendants in which private hospitals occupying the same position as wholesalers-retailers in the marketing chain of distribution are obtaining *ten* times more than wholesalers and retailers—without even being required to file individual claims. See *Hartford Hospital, et al.* v. *Pfizer, et al.*, 69 Civ. 755, (S.D. N.Y.), opinion of April 21, 1971.

CCS plaintiffs are receiving well over 100 percent of their presumed single damages while wholesalers and retailers will get roughly 3 percent of their damages (based on overcharge alone, without regard to special or other damages). Yet, as the trial judge noted in the criminal case, and as defendants and the government have confirmed the evidence of conspiracy was not directed at the CCS market at all. It seems axiomatic

that CCS plaintiffs having the added burden of producing evidence not adduced at the criminal trial addressed to liability in the first instance (regardless of the *prima facie* effect of any conviction) are simply not entitled to 100 percent of presumed damages when other classes who have available to them vast evidence of the underlying conspiracy to fix prices are given *de minimus* sums in the same settlement allocation. Stated differently, wholesalers-retailers and consumers purchased 93 percent of the defendants' products to 7 percent for CCS plaintiffs, but because of CCS control of consumer class actions and consumer unclaimed funds and the unnatural power inherent in that weapon, CCS plaintiffs are receiving $60 million plus $27 million of so-called unclaimed consumer funds (or a total of $87 million out of $100 million) while individual consumers will get $10 million and retailers and wholesalers $3 million (plus $8.5 million in interest).

By itself, the fact of CCS plaintiffs' receiving 87 percent of a total settlement fund for 7 percent of the purchases without the benefit of evidence of record of a conspiracy directed against them, while wholesalers and retailer plaintiffs with 93 percent of the purchases received roughly 3 percent of the fund when the evidence shows a conspiracy only against them is so shocking a result that this Court's scrutiny of these class actions is compelled.

In view of the foregoing certainly this Court should consider this petition for certiorari at the same time that it is deciding the merits in the criminal aspect of the antibiotic case for which it has already granted certiorari.

IX.

THE COURT OF APPEALS DECISION HAS SANCTIONED AN ASSIGNMENT OF PRIVATE RIGHTS OF AN ENTIRE CLASS TO PUBLIC BODIES BY THE SILENCE OR INACTION AFTER A SINGLE PUBLICATION BY THE PUBLIC BODY ASSIGNEES, THUS CREATING A DEVASTATING PRECEDENT OF ASSIGNMENT OF RIGHTS BY SILENCE OR INACTION THAT MAY AFFECT ALL FUTURE LITIGATION.

The Court of Appeals has determined that silence of some 60 million consumers resulted in the assignment of each person's individual claim to the state, notwithstanding the lack of any affirmative act of assignment or intent to assign, or any legal authority for an assignment by silence. Moreover, CCS counsel themselves abandoned this theory in the District Court and never advocated it in the Court of Appeals.

Such assignments operate to the constitutional detriment of the competing druggist class who never had notice or an opportunity to be heard on this notice vitally affecting their rights to their aliquot portion of the fund. In the absence of such assignment the $27 million of unclaimed consumer funds are available for the Wholesaler-Retailer Class based on their claims filed and the applicable law and facts. The theory of assignment by silence creates precedent for future enormous abuse and violations of due process of law by similar practices.

The Court of Appeals decision conflicts with that circuit's earlier decision in *Eisen* v. *Carlisle & Jacquelin*, 391 F. 2d 555, 568 (2nd Cir. 1968) where the Second Circuit condemned "a ritualistic notice in small print on

the back pages of a newspaper" as a means of extinguishing national class rights.

The Court of Appeals approval of the assignment by silence notice deprives the consumer class of constitutional due process (if they have any Section 4 rights) and simultaneously denied due process to the competing druggist class by sanctioning the denial of a hearing on this notice, contrary to the standards established by the Supreme Court in *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306 (1949) and *Hansberry* v. *Lee*, 311 U.S. 32 (1940).

Concepts of due process of law are stretched beyond all proper limits by assignments through notices which clearly could not have reached all or even most of the recipients and which purport to give the claimant's money to a class representative.

X.

THE LOWER COURTS' DECISIONS IN CREATING UNCERTAINTY AND CONFUSION BY VIRTUE OF THE CONFLICTS WITH OTHER CIRCUITS AND THE DECISIONS OF THIS COURT REQUIRE THE EXERCISE OF THE SUPERVISORY POWERS OF THIS COURT TO PROTECT LITIGANTS AND CLASS MEMBERS IN THE FOLLOWING AREAS:

A. Delineation of the rights of all persons in the chain of distribution in antitrust price fixing cases. (This has already been discussed in I, II, and III.)

B. The right of states and other governmental entities to represent consumers or other individual citizens in their individual actions for damages under Section 4 of the Clayton Act under parens patriae concepts or

Rule 23 representation. (This has already been discussed in V, VI and VII.)

C. Establishment of the criteria for the duties of the court under Rule 23(e) of the Federal Rules of Civil Procedure in regard to settlement in class and multi-class actions in antitrust litigation. (This has already been discussed under IV.)

D. Establishment of criteria of selection of class action representatives and attorneys, including the effect of conflicts of interest on such representation.

The manner of selecting the class representatives in class actions is also a matter of urgent concern of this Court for all class action litigation. In this case, class representatives and attorneys were selected solely on the basis of their acceptance of the offer of the defendants. All parties and attorneys who accepted the defendants' offer were automatically made class representatives. All those not accepting the offer were told to opt out and, inferentially, would run the risk of relinquishing their right to comment upon or attack the settlement. This carrot and stick approach is pregnant with the opportunity for and appearance of collusion. It provides the defendants with the opportunity for shopping for a plaintiff or group of plaintiffs who will accept a comparatively low settlement and offer to submit this settlement to a large class of claimants.

Such a situation not only occurred in this case, but immediately triggered an identical procedure in one segment of the *plumbing fixture* cases, shortly after the entry of the District Court's Memorandum Opinion. In the *plumbing fixture* cases an *ad hoc* committee of plumbing contractors rejected a nominal offer from the defend-

ants. Pursuant to Affidavit of Morton Hamburg Esq. of New York filed in that case, it was alleged that the defendants approached the Chairman of that Plaintiffs' Committee and told him that if the Committee did not accept the nominal settlement, they would find someone who would. And they did. Due process of law requires not only the protection that can be afforded to the absent class members by the Judge involved, it must eliminate the appearance of and opportunity for collusion. It must also afford to the absent class members the benefits that would accrue even in a settlement context from a position of negotiation fortified by a determination of class representation not tied to an offer of the defendants. Certainly it can be expected that any class representative can negotiate a higher settlement if he is first declared as the class representative than if he is told that he can be the class representative only if he accepts the offer of the Defendants. Even if the offer of the Defendants approaches the lower threshold of the parameters of a reasonable settlement, the absent class members are entitled to the additional increment that can be fairly negotiated on the strength and leverage of independent class determination. To do otherwise creates a built-in procedural edge which any Defendant can use to create a windfall in the form of significantly lower damage or settlement payments.

The opportunity for and appearance of collusion is increased considerably where, as occurred here, the attorneys for the class representatives have significant conflicts of interests, legal disabilities and related aligned interests that could encourage the sacrifice of the rights of one group for another. For example, in the instant case, some attorneys on the Committee of Counsel for the

druggist class were also attorneys for States competing against the druggist class for a share of the same fund. Three other attorneys on this same committee were simultaneously representing private hospitals in a separate, but related settlement in that it was the subject of a separate, but simultaneous offer. It was related because if the druggist settlement did not go through, the defendants had the right to withdraw from the hospital settlement. Hospitals and druggists are in exactly the same position in the distribution chain. Yet, the hospital class received a ten times greater settlement based on a comparison of the purchases made by each group and the gross settlement amount received for the respective classes. See *Hartford Hospital et al.* v. *Pfizer et al.*, 69 Civ. 755 (S.D. N.Y.) Opinion, April 21, 1971.

All of this representation was permitted over objection and without a hearing, although a hearing was requested.

A hearing was compelled on the issue of "adequacy of representation" according to existing holdings of the Circuits, and the presently standing opinions below create a conflict with those Circuits and the Second Circuit. The issue of "good faith arm's length" negotiation and the consentual nature of the approval of the global settlement and its allocation by some of the class attorneys was directly raised by verified Petitions alleging legal disabilities and conflicts of interest between CCS Counsel and Attorneys for the wholesaler-retailer class. This was in addition to the issue raised of conflicts between states, etc. recovering against a settlement fund for themselves and for their consumers who made claims or remained silent in the same contest for the same money.

The issue of "adequacy" was never examined by any hearing, yet the Second Circuit in *Eisen* v. *Carlisle* &

Jacquelin, 391 F. 2d 555 (2nd Cir. 1918) required a hearing on this issue when properly raised. See *Doglow* v. *Anderson,* 43 F.R.D., 472 (E.D. N.Y. 1968); *Fischer* v. *Kletz,* 41 F.R.D. 377 (S.D. N.Y. 1966); Chafee, Some Problems of Equity 231 (1950). New Rule 23 places the issue of adequacy in greater significance and under more careful scrutiny to eliminate possible "collusiveness and antagonistic and conflicting interests" and required a hearing in the District Court when these issues were advanced.

E. Due process considerations relating to notice to class members, including the ability to terminate rights of a substantial percentage of class members without any notice whatsoever.

The decisions and opinions of the lower Courts conflict with this Court's holdings and admonitions in *Hansberry* v. *Lee,* 311 U.S. 32 (1940) and *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950).

The notices sent to wholesaler and retailer druggists were constitutionally defective denying these Plaintiffs due process of law under the Fifth and Fourteenth Amendments because:

(1) The notice mailed to this class was *not sent* to a substantial number of class members (those no longer in business on the date the notice was mailed) even though class action complaints for these class members were dismissed by the District Court under Rule 23(e); and no notice was given to them, not even ~~by~~ publication.

(2) The notice to this class was intended to be relied upon and was relied upon; it informed the class of the availability of an unallocated sum within the broad confines of the $100 million settlement offer, invited individual participation by the filing of verified claims, established a competition among three competing classes of

claimants, two of which were required to file claims, consumers and druggists but not cities, counties, and states; however, after the claims were filed, the Court ignored the lack of claims by cities, counties, and states, effectively ignored all claims filed by the other two classes and instead approved a predetermined allocation of funds giving cities, counties, and states their consumers' money —completely disregarding the valid claims filed by wholesaler and retailer druggists.

All law of "settlement," as discussed above, assumes that a proper class notice to all class members conveyed to them sufficient information so each could intelligently exercise the right to opt out or remain in the litigation and be bound by the res judicata affect of any judgment or order of dismissal and compromise. The right to opt out is of fundamental importance because failure to exercise that right by an affirmative act waives the right forever—and in a true settlement failure to exercise the right reduces and limits the scope of objections by a class member to an abuse of discretion.

In these cases, the Constitutional right to opt out was denied the wholesaler-retailer class at the critical stage in the proceedings when each classes' separately allocated recovery was under Court consideration. Instead, the opt out right was afforded to that class early in the "settlement" proceedings when presumably there was an unallocated fund. Thus, on the surface, each class member was invited to opt out of or to be bound in a $100 million settlement fund contest, and not as a claimant against $3 million, or $11 million or some other more indefinite, but small sum out of $100 million, or some other sum. See *Cooper v. Goldsmith*, 135 F. 2d 949 (C.A. D.C. 1943) where a similar type of notice was so tainted as to invalidate the notice and nullify the Court orders.

The Constitutional validity of the opt out right is premised on the District Court's assurances to all classes of litigants on April 29, 1969, that an adjudication would be made by that Court in determining the sum allowable to the wholesaler-retailer class after the Court weighed all facts and law applicable to the three competing classes established in the settlement offer. But, in view of the failure of that Court to conduct a hearing which could then result in an independent exercise of judicial decision making, and because of that Court's abdication of the judicial function under Rule 23(e) and its discrimination in standards of proof between the three competing classes, the earlier opt out right was merely illusory and afforded class members discriminated against no proper Constitutional protection whatsoever. Minimum standards of due process compelled offering the wholesaler-retailer class a second right to opt out when the conditions existing when the first Rule 23 notice was sent suddenly vanished, contrary to all assurances by the Court of judicial allocation in a claims contest in the absence of full agreement by all the parties. Changing the scheme of this settlement in midstream demanded notice to the class to apprise them of the departure of the proceedings from the representations made before the Court and by it prior to the notice to the class or this substantial departure from earlier representations and procedures vitiated all these proceedings.

This case must be contrasted with a single settlement to one class of Plaintiffs. An opt out against a large global offer is meaningless unless the Court fulfills its duty of making a judicial determination, and any consent of class representatives to a lesser sum than the class sought or any attempt by class representatives to waive the classes' legal rights to have that judicial de-

termination based on evidence is void and unconstitutional. Class representatives have no right to waive the classes' legal rights and to permit those rights to be lost by improper notices and radical changes of theory and fact. Any assumption that the initial notice to the wholesaler-retailer class was constitutional in the first place under *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306 (1949) renders all subsequent conduct by that class's lawyers and the Court a total nullity.

The notice to druggists failed to inform them of another important result of the Order of Discharge The Order of Discharge purports to relinquish all claims which could have been brought by the parties. This would preclude other actions by druggists or consumers (if consumers have any rights) for other violations both of antitrust laws, e.g. Robinson Patman violations, or breach of warranty claims for ineffective drugs or for injurious drugs.

The exercise of this Court's supervisory powers is compelled by the foregoing procedural and substantive deficiencies in these class action notices and in the representations of absent class members. The proliferation of class action antitrust litigation with its vast economic impact—both by treble damages and by settlements—impels direction to all litigants to insure due process of law to wide-spread Rule 23 classes.

CONCLUSION

Petitioners submit that the flaws in this case are so apparent that they strike at the jugular vein of the law. Precedent and decisions are totally ignored and Rule 23 is stretched to unconstitutional bounds, all in the name of "settlement." No appellee denied in the Court of Ap-

peals that a settlement will result even if a reversal takes place, because the settlement fund has been irrevocably deposited by the defendants for allocation to classes pursuant to judicial decision.

The class action can be an important tool in the attainment of justice but unless this Court now takes action to clean up the situation of professional class attorneys preying upon everyone, representing different classes competing for the same fund, creating spurious concepts contrary to existing law, and exchanging favors and offering inducements to representatives of other classes, all for the purpose of procuring larger fees for themselves —the class action will not be a useful tool in the administration of justice.

One of the most important questions here is can litigants in class actions, in a settlement context, arrogate to themselves rights denied to them by law and contrary to the mandates of the Courts. The Court in this situation is not permitted to rely on the silence of the absent members of a class. Their absence does not relieve the judge of his duty but in fact adds to his responsibility. The Court in approving a settlement which gave to the States rights which they do not have under the law clearly abused its discretion and in doing so practically eliminated private rights under Section 4 of the Clayton Act.

The espousal of the *parens patriae* theory and then the Rule 23 application to have the States act as representatives for consumers in their individual damage claims was a subterfuge of the three attorneys representing 33 States, to enrich themselves by larger fees for the procurance of larger sums, regardless of the viola-

tion of legal precedent, regardless of the impact on future antitrust litigation (in fact to foster it in this same vein for their future enrichment.) Antitrust legislation was enacted for the purpose of being an effective deterrent against price-fixing conspiracies and not for the purpose of consummating settlements of convenience to procure attorneys large fees. The representatives of the CCS group have negotiated a "devil's bargain" and in their "stampede of greed" and haste to make it a *fait accompli*, they are attempting to make the Court the advocate of such a devil's bargain.

These appellees, particularly these three C.C.S. attorneys representing thirty-three States have ramrodded this inequitable settlement through the lower Courts—using every device to accomplish it—intimidation, seduction by interlocking interests and exchanging of favors for members on other committees, by propaganda, and by innovations of convenience not based on legal concepts.

The lower Courts also forgot that in this litigation there is superimposed upon the settlement, matters beyond the pale of the litigants themselves, namely the public policy behind the antitrust laws, the denial to states by the mandates of the Court and historically of any right to represent individual citizens in regard to individual claims for damages in any tort action, the unwarranted burdening of court's dockets against all concepts of existing precedent and without reason of justification. Nowhere you turn can you find justification for the decisions of the lower courts—not on the law—not in the context of settlement—not on the basis of proper representation of the classes—not on the facts—not in fairness or reasonableness.

The need for this Court's intervention to prevent the chaos caused by these types of so-called settlements is illustrated by the double ploy used by the defendants. In these settlements the defendants join with the public entities to eliminate the private rights of direct purchasers, while in the litigating cases the defendants are stating that these direct purchasers have all the rights, that remote consumers have no standing to sue and that states have no rights to represent consumers under either Rule 23 or *parens patriae*.

If attorneys can persevere in class actions to truly represent their class, can fight to preserve the body of precedent in antitrust law which is sound and good, can reject inducements involving their self-interest—they are at least entitled to have the courts aid them and give them encouragement. In this day and age when we are urging persons to persevere in achieving justice *within* the system—it is incumbent on us to prove it can be done. In the instant case it can be done by this Court demonstrating that the appellants with the law and facts on their side can persevere— and within the framework of our system—win justice against the sophistry of those who arrogantly use the system for their own selfish ends.

No more compelling reasons for granting a writ of certiorari could obtain than in the instant case. The lower court decisions are in obvious and direct conflict with the decisions of this Court, with decisions of Courts of Appeals of other Circuits and with District Court decisions in their own Circuit and in other Circuits from which no appeal was taken. There are exceptional errors of fact as in the finding of a 66⅔ uniform mark-up for all druggists in America. There is misconstruing of Federal Rules of Civil Procedure. The issues are of such importance that they are changing the entire precedent

in antitrust law and setting up public entities as the only civil enforcers of the antitrust laws. The supervisory powers of this Court are called upon to define the lower Courts' duties under Rule 23(e) as a party to a compromise in proposed settlements in class and multiclass actions and to determine what constitutes proper representation in class actions under Rule 23 of the Federal Rules of Civil Procedure.

This case is a lesson in the sheer power of litigants to disregard and discard the law and impose their will on weaker litigants and eventually on the courts. It is a classic case of overreaching from greed for money, power and attorneys' fees. This Court has today an opportunity to clean up the misuse of power by professional class attorneys using the cloak of respectability of special assistant attorneys general, and to restore confidence in the Courts and the law by continuing to follow some sixty-five years of antitrust precedent.

It remains for this Court to man the dikes or else these half-hatched non-legal theories founded on disregard of the background of antitrust law and the enunciated public policy of said laws—will inundate the Courts with litigation, while sweeping away in its torrents all the precedent in antitrust law.

The exposition in this petition for writ of certiorari and the variegated facets of this case seem to make most compelling oral argument in support of this petition for writ of certiorari, which oral argument is hereby respectfully requested.

For the reasons stated above, this Honorable Court should grant the petition for writ of certiorari sought herein by Cotler Drugs, Inc., et al. and Louis Patlogan.

Dated June 24, 1971.

Respectfully submitted,

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APPENDIX I

STATE OF WEST VIRGINIA, *Plaintiff*,

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, OLIN MATHIESON CHEMICAL CORPORATION, and THE UPJOHN COMPANY, *Defendants*.

No. 68 Civ. 240.

and other antibiotic drug antitrust actions.

United States District Court,
S.D. New York.

June 24, 1970.

As Amended Sept. 18, 1970.

WYATT, *District Judge*.

This is an application by defendants and by plaintiffs in these class actions for approval of a proposed compromise under which the actions and all claims of the classes therein will be settled and dismissed with prejudice. Fed.R.Civ.P. 23(e). The application is granted and the proposed compromise is approved.

These are 66 civil actions, 26 of which were commenced in this District and 40 of which were transferred to this District by the Judicial Panel on Multidistrict Litigation (the Panel) "for coordinated or consolidated pretrial proceedings" (28 U.S.C. § 1407; see 295 F.Supp. 1402, 297 F.Supp. 1126, 299 F.Supp. 1403, 301 F.Supp. 1158, 303 F.Supp. 1056, 309 F.Supp. 155). The 66 civil actions which are the subject of the present application are sometimes referred to in this opinion as simply "these actions".

The same five companies are defendants in each of these actions (Squibb Beech-Nut, Inc. is also a defendant in

some actions); they may be referred to as Pfizer, Cyanamid, Bristol, Squibb (a division of defendant Olin Mathieson Chemical Corporation until about January 1, 1966 and ultimately a part of Squibb Beech-Nut, Inc.), and Upjohn. They have been for some years sellers of broad spectrum antibiotic drugs, the most important of which is tetracycline and on which a patent, owned by Pfizer and often called "the Conover patent", issued on January 11, 1955. Pfizer, Cyanamid and Bristol made tetracycline and sold it in dosage form. Bristol sold tetracycline in bulk to Squibb and Upjohn which sold it in dosage form.

Antibiotic drugs are prescription drugs used for infectious diseases. Broad spectrum antibiotic drugs, such as tetracycline, are effective against a wider range of germs than are the narrow spectrum antibiotic drugs, such as penicillin. The word "antibiotics" when used in this opinion refers to broad spectrum antibiotic drugs.

There are in total before this Court some 150 similar civil actions against the same defendants, either commenced in this District or transferred here by the Panel. These some 150 actions are divided into the following groups: (a) the 66 actions which are the subject of the present application; (b) some actions in which plaintiffs were offered but rejected the same proposed settlement on which the present application is based; (c) some actions in which plaintiffs have not been offered any settlement by defendants; and (d) about 26 actions in which plaintiffs are private hospitals to which a separate offer of settlement has been made by defendants.

The claim in each of the actions is that defendants violated the antitrust laws in the sale of antibiotics, specifically Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2); treble damages are sought, as authorized in 15 U.S.C. § 15.

A. Development of Broad Spectrum Antibiotics

Generic Name	Trade Name	First Introduced	By Whom
chlortetracycline	Aureomycin	December 1948	Cyanamid
chloramphenicol	Chloromycetin	January 1949	Parke, Davis
oxytetracycline	Terramycin	March 1950	Pfizer
tetracycline	Achromycin	November 1953	Cyanamid
	Tetracyn	January 1954	Pfizer
	Polycycline	April 1954	Bristol
	Steclin	September 1954	Squibb
	Panmycin	October 1954	Upjohn

Cyanamid owns the patent for chlortetracycline (the Duggar patent) issued September 1949, and an improvement patent (Niedercorn) issued September 1952.

Pfizer owns the patent for oxytetracycline (the Sobin patent) issued July 1950.

When the Duggar and Sobin patents issued, the chemical structure of the antibiotics produced—trade names, Aureomycin and Terramycin—were not known.

In 1952, a Pfizer research team made the first discovery of the chemical structure of Aureomycin and Terramycin. On June 17, 1952, Conover, a member of the Pfizer team, discovered tetracycline by removing the chlorine atom from Aureomycin.

Tetracycline proved to be highly superior to the earlier antibiotics.

The discovery of tetracycline was announced to the world in an article on August 8, 1952 in the Journal of the American Chemical Society. On October 23, 1952, application for the Conover patent was filed. Thereafter, applications for tetracycline patents were filed by Cyanamid and by Bristol, among others.

It eventually developed that to produce tetracycline, it was necessary to use the Duggar and Niedercorn patents for the fermentation process. If a patent on the Conover invention were issued to Pfizer, then neither Cyanamid nor Pfizer could make tetracycline except by agreement between them. Each would be blocked by a patent of the other.

After meetings on November 7 and 14, 1953 between McKeen (Pfizer) and Malcolm (Cyanamid) an agreement was made by which Cyanamid would license Pfizer under the Duggar and Niedercorn patents; in addition, it was agreed that proofs of priority on tetracycline would be exchanged; that the party found (on such exchange of proofs) not to have priority would then concede priority to the other; and that the party receiving the patent on tetracycline would then license the other.

Bristol began making and selling tetracycline in May 1954. It cold the drug in bulk to Squibb and to Upjohn, who in turn sold in dosage form under their respective trade names. Bristol also sold in dosage form under its trade name.

Cyanamid brought an action against Bristol in September 1954, asserting that in making tetracycline Bristol infringed the Duggar and Niedercorn patents. This action was settled in December 1954 and Bristol received a license (with royalty to Cyanamid for use of the Duggar and Niedercorn processes in making tesracycline.

After an exchange of evidence as to priority, Cyanamid conceded in February 1954 that Conover was prior in discovery of tetracycline.

The Conover patent issued on January 11, 1955 and has since been owned by Pfizer.

On the same day the patent issued, Pfizer commenced an action against Bristol, Squibb and Upjohn in the Northern District of Georgia. The charge was infringement of the Conover patent for tetracycline.

Bristol, Squibb and Upjohn then sued Pfizer in this Court for a declaratory judgment on the Conover patent and, over strong opposition from Pfizer, obtained transfer of Pfizer's action from the Northern District of Georgia to this Court (131 F.Supp. 21, 225 F.2d 718, 225 F.2d 720).

The litigation between Pfizer on the one hand and Bristol, Squibb and Upjohn on the other was settled on December 15, 1955. To a considerable extent this was due to the efforts made by Schwartz, president of Bristol. Licenses under the Conover patent for tetracycline were granted by Pfized to Bristol, Squibb and Upjohn (with royalty to Pfizer).

B. The Claims in These Actions are Based on Charges by the Federal Trade Commission and in an Indictment

It is without dispute that the claims in the complaints are substantially the same as charges made against the defendants by the Federal Trade Commission (the Commission) and in an indictment against three of the defendants heanded up by a grand jury in this District on August 17, 1961. A review of these proceedings, and of an investigation by a Senate Subcommittee, will be useful as background.

C. Proceedings by the Commission and by a Senate Subcommittee

1. Investigations by the Commission

In 1951, the Commission began an investigation of the pricing policies of Pfizer in selling "Terramycin", its trade

name for an early broad spectrum antibiotic. Pfizer furnished extensive data. This lasted until 1955.

By resolution on July 22, 1953 (amended on July 13, 1956), the Commission initiated an investigation (15 U.S.C. §§ 46, 49) of "the * * * business, conduct, practices and management of corporations engaged in the production, sale or distribution of antibiotic drugs * * * *". This investigation went on until 1958. The defendants and others responded to extensive data requests of the Commission. On the basis of these responses and other material and records, the Commission in June 1958 issued an "Economic Report on Antibiotics Manufacture"; this Report was of some 360 pages.

2. Investigation by a Senate Subcommittee

In 1959 and 1960, the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary investigated the ethical drug industry, which included the defendants here. Senator Kefauver was Chairman of the Subcommittee and Paul Rand Dixon was its Counsel and Staff Director. At the request of the Subcommittee, defendants furnished documentary material and other information. For six days in September 1960 there were public hearings before the Subcommittee, principally about antibiotics and about many of the matters involved in these actions. A report of the Subcommittee entitled "A Study of Administered Prices in the Drug Industry" (S.Rep. No. 448, 87th Cong., 1st Sess. 1961) was transmitted to the full Committee on May 8, 1961.

3. The Complaint of the Commission; Taking of Evidence

On July 28, 1958, the Commission issued a complaint charging the defendants with unfair methods of competition and unfair acts and practices in the sale of antibiotics,

all in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).

The charges made by the Commission in summary were these:

a. that Pfizer secured issuance of the Conover patent by fraud on the Patent Office and, aside from such fraud, secured issuance of the patent despite the fact that the invention was obvious and in public use before the Conover application was filed;

b. that by conspiracy all five defendants secured issuance of Pfizer of the Conover patent; that Pfizer made false representations to the Patent Office; that Pfizer, Bristol and Cyanamid withheld material information from the Patent Office; and that the other four defendants obtained licenses from Pfizer with knowledge of the fraud on the Patent Office and with knowledge that the invention was not patentable; and

c. that by conspiracy all five defendants fixed prices and, by keeping out competitors, monopolized antibiotics.

The defendants by October 15, 1958 had served their answers, denying the charges in the Commission's complaint.

Evidence was taken before Robert L. Piper, a Hearing Examiner, between January 1959 and February 1960. There was testimony by witnesses, apparently all in New York, on 86 days. The Commission called 13 witnesses; the defendants called 45 witnesses; and 3 witnesses (accountants) were considered as called by the Hearing Examiner. The testimony appears to have run to some 9,000 pages in the stenographic transcript. The documentary exhibits were

massive in number and extent; they occupy at least 12 printed columns and consist of some 8,000 pages.

The witnesses before the Hearing Examiner included in chief executives of each of the defendants: Malcolm of Cyanamid, McKeen of Pfizer, Schwartz of Bristol, Toohy of Squibb, and Gilmore of Upjohn. They each denied categorically that they were parties to any conspiracy or any other sort of price fixing agreement.

4. Initial Decision of Hearing Examiner

The Hearing Examiner filed an Initial Decision on October 3, 1961. This is a detailed document of about 270 printed pages. The Decision was completely in favor of defendants, exonerating them from any violation of the Federal Trade Commission Act and ordering that the complaint be dismissed.

5. Decision of Commission

The matter was then taken to the full Commission.

Meanwhile, in March 1961, Paul Rand Dixon had been named Chairman of the Commission; as already mentioned, he had been Counsel and Staff Director to the Senate Subcommittee which investigated the drug industry, including these five defendants, and made a report thereon.

The defendants moved that Chairman Dixon be disqualified. The Commission on December 20, 1961 denied the motion on the ground that disqualification was "for determination by the individual member concerned". Chairman Dixon declined to withdraw from participation in the proceeding.

The Commission (Dixon, Anderson, Elman, MacIntyre, Higginbotham) on August 8, 1963 filed its opinion, findings of fact and conclusions of law written by The Honorable A. Leon Higginbotham, Jr., then a Commissioner and now

a United States District Judge for the Eastern District of Pennsylvania. The Commission issued orders on August 8 and December 17, 1963.

The opiinon of the Commission disagrees in large part with that of the Hearing Examiner.

The Commission decision may be summarized as follows:

a. Pfizer by misrepresentations to and withholding information from the Patent Office prevented an accurate decision on the issuance of a patent on tetracycline on the Conover application;

b. the conduct of Cyanamid before the Patent Office was the same as that of Pfizer;

c. that it was not proven that a conspiracy existed between Pfizer and Cyanamid before the Patent Office, or any conspiracy among the five defendants to exclude others;

d. there was no misconduct before the Patent Office by Bristol, Squibb or Upjohn; and

e. the five defendants conspired to fix prices for tetracycline.

The final order of the Commission was that the five defendants cease and desist from any and all forms of price fixing agreements, that they each take specific steps in respect of independent pricing activities, that Pfizer grant to any applicant a license under the Conover patent for a royalty of not more than 2½% of net sales, and that Cyanamid grant to any applicant a license under the Duggar and Niedercorn patents for a royalty of not more than 2½% of net sales. See Note: Improperly Procedure Patents: FTC Jurisdiction and Remedial Power, 77 Harv.L.Rev. 1505 (1964).

6. Decision of the Court of Appeals (363 F.2d 757)

The defendants obtained a review of the Commission's order by the Court of Appeals for the Sixth Circuit (15 U.S.C. § 45(c)).

The decision of the Court was handed down on June 16, 1966.

The Court first decided that the active part played by Chairman Dixon while counsel to the Senate Subcommittee caused him to form opinions as to facts which later became "inseparably a part of the ultimate findings of fact of the Commission" (363 F.2d at 765). The Court concluded that the participation of Chairman Dixon in the decision of the Commission was a denial of due process to the defendants, requiring that the decision be set aside and the matter remanded for a fresh consideration by the Commission without any participation by Chairman Dixon.

The Court expressed no opinion whether there was substantial evidence to support the findings of the Commission that there was price fixing by defendants.

As to the issue of misconduct before the Patent Office, the Court expressed its opinion at some length.

The Court found that the fundamental question was whether coproduction (or inherent production) of tetracycline in the fermentation *broths* from which chlortetracycline (Aureomycin) had been recovered was material to the issuance of the Conover patent. There is a distinction between coproduction of tetracycline in the *broths* and the presence of tetracycline in the resultant *product* (Aureomycin). In this connection, the Court believed that there were many questions as to the actions and purposes of Patent Examiner Lidoff, who allowed the Conover patent, and was surprised that Lidoff, because of Patent Office

policy and practice, had not been called as a witness. The Court saw no reason why Lidofffl should not be required to testify and the Court framed about 12 specific questions for him. The Court found that, absent any testimony from Lidoff, the order of the Commission on the Patent Office misconduct issue was not supported by substantial evidence.

7. Initial Decision on Remand

On remand, it appeared that Mr. Piper was no longer employed by the Commission. The matter was referred to Abner J. Lipscomb, as Hearing Examiner, for taking the testimony of Lidoff and of any witnesses who had already testified on the issue of misconduct before the Patent Office.

There were hearings before Mr. Lipscomb in Washington on September 12 and 13, 1966. Lipoff was called for the Commission and testified; Hutz, a patent attorney for Pfizer, and Murphy, who did patent work for Pfizer, were called for Pfizer and testified.

The testimony of Lidoff in summary was that on November 24, 1954 he rejected the Conover product claims because he believed it probable that tetracycline had been produced along with chlortetracycline (Aureomycin) in the *broths* of the Duggar and Niedercorn processes; that thereafter he accepted the statements of tests by Pfizer that no identifiable tetracycline was produced in the Duggar-Niedercorn process; that had he known there was in fact such coproduction, the Conover patent would not have issued; that he was interested in whether there was co-production in the *broths,* not whether tetracycline was present in the product Aureomycin; that he did not know tetracycline was present in the product Aureomycine; that had he known this, he would have rejected the Conover application on this ground, a different ground and one

which related to prior public use rather than to disclosure in published patents (the basis on which he was interesaed in the Duggar-Niedercorn broth production).

The assignment to Hearing Examiner Lipscomb was solely for decision whether Pfizer and Cyanamid made misrepresentations, etc. to the Patent Office and thus caused Lidoff to allow a patent which otherwise would not have been allowed. Hearing Examiner Lipscomb accepted the testimony of Lidoff and adding this to the evidence already in the record rund substantial evidence that there was misconduct by Pfizer and Cyanamid before the Patent Office as a result of which the Conover patent issued. The initial decision of the Hearing Examiner on remand was made on November 9, 1966.

8. Decision of the Commission on Remand.

The matter then went to the Commission. Chairman Dixon did not participate. Since the time of the first decision, Commissioners Anderson and Higginbotham had been replaced by Commissioners Reilly and Jones. The four Commissioners who decided the matter on remand were thus Elman, MacIntyre, Reilly and Jones.

The Commission on September 29, 1967 filed its opinion and on the same day issued its order.

As to the patent issue, the Commission found that the testimony of Lidoff supported the earlier findings and opinion of the Commission rather than those of the first Hearing Examiner, Mr. Piper. It was concluded that Pfizer and Cyanamid in substance were guilty of fraud on the Patent Office, as a result of which the Conover patent issued.

As to the price fixing issue, the four Commissioners were evenly divided. On the basis of new firms entering the

field and of a decline in prices, Commissioners Elman and Reilly believed it was not necessary to decide the price fixing issue, which (in simple terms) was whether the earlier uniform prices were the result of conspiracy among the five defendants. Commissioners MacIntyre and Jones believed that the earlier findings and order as to price fixing should be adhered to and issued. There being no majority of the Commission in support of findings and an order as to price fixing, the complaint so far as it charged price fixing was dismissed.

The final order of the Commission dealt only with misconduct of Pfizer and Cyanamid before the Patent Office and as to this the final order was the same as the earlier order. No part of the order was directed against Bristol, Squibb or Upjohn; as to them the complaint was dismissed completely.

9. Second Decision of the Court of Appeals (401 F.2d 574)

Pfizer and Cyanamid obtained a review of the Commission's order by the Court of Appeals for the Sixth Circuit (15 U.S.C. § 45(c)).

The decision of the Court was handed down on September 30, 1968.

It was found that Lidoff had answered the material questions framed in the Court's first opinion and that this testimony supported the original findings of the Commission and contradicted the findings of Hearing Examiner Piper. The misconduct of Pfizer and Cyanamid was shown by substantial evidence and justified the compulsory licensing order of the Commission. The Court declined to pass on the credibility of Lidoff, saying that it would

not "second-guess the Hearing Examiner and the Commission" (401 F.2d at 584). The order of the Commission was affirmed.

It may be noted that the Court did not decide whether the views of Lidoff as to patent law were correct or not. Lidoff testified that had he known what Pfizer and Cyanamid knew as to coproduction of tetracycline and as to its presence in Aureomycin, he would not have allowed the patent. As will be mentioned later, there may be some question whether this would be good patent law. Decisions such as Parke-Davis & Co. v. H. K. Mulford Co., 189 F. 95 (C.C. S.D.N.Y.1911), affirmed 196 F. 496 (2d Cir. 1912) raise difficult issues in this connection. The Court of Appeals for the Sixth Circuit stated that it "did not undertake to pass upon the validity of the [Conover] patent" (401 F.2d at 586).

10. Denial of Certiorari

The Supreme Court denied certiorari on March 24, 1969 (394 U.S. 920) and the Commission proceedings came to an end.

D. The Criminal Proceedings to Date

1. The Indictment; its Dismissal as to Individual Defendants

A grand jury in this District returned an indictment (61 Cr. 772) on August 17, 1961 naming as defendants Pfizer, Cyanamid, Bristol, McKeen (of Pfizer), Malcolm (of Cyanamid) and Schwartz (of Bristol). Squibb and Upjohn were named as co-conspirators.

The indictment charged in three counts a conspiracy in restraint of trade, a conspiracy to monopolize trade, and

a monopoly of trade, in broad spectrum antibiotics. It was charged that Sections 1 and 2 of the Sherman Act had been violated.

The indictment covered the same ground as that covered by the complaint of the Commission. It was charged that defendants, pursuant to a conspiracy, misled the Patent Office, used patents to exclude competitors, and fixed prices. All defendants pleaded not guilty.

After the return of the indictment, a grand jury in January 1962 was empanelled in the District of Columbia and investigated the conduct of a government official in transactions with drug firms, including these defendants. Under subpoena, McKeen, Malcolm and Schwartz testified before this Grand Jury (which returned no indictment). On motion of these individual defendants and over the Government's opposition, Judge Ryan, by order with opinion filed September 9, 1965, dismissed the indictment as to them (245 F.Supp. 801). The reason was that by testifying before the grand jury in the District of Columbia the individual defendants became immune from prosecution on the indictment in this District (15 U.S.C. §§ 32, 33).

2. The Criminal Trial

Trial of the indictment took place between November 23 and December 29, 1967 before Judge Frankel and a jury.

Nearly all the testimony offered by the government came from employees or former employees of the three defendants and the two alleged co-conspirators. The government called six witnesses from Pfizer, four from Cyanamid, three from Bristol, four from Upjohn, and one from Squibb; in addition, the government read the testimony in the Commission proceedings of Malcolm of Cyanamid (ill at time

of trial) and Niedercorn of Cyanamid (who had died). The government called six witnesses who had not been connected with any defendant or alleged co-conspirator; these included Patent Examiner Lidoff. Most of the documentary evidence offered by the government came from the defendants or from alleged co-conspirators.

The defendants put in their case through the cross-examination of the government witnesses, most of whom were their employees or former employees.

In its bill of particulars, the government had stated that McKeen, Malcolm and Schwartz were responsible for the "pricing policy" of their respective companies. McKeen and Schwartz were called by the government and testified at trial and (as already noted) testimony of Malcolm was read by the government to the jury. They each categorically denied doing any of the acts charged in the indictment.

It was developed at trial that Parke Davis & Co. was a maker of broad spectrum antibiotics, was second in volume o fsales of such antibiotics, followed the same prices and practices as the defendants on trial, and was concededly not a member of any conspiracy.

After the government rested on December 8, 1967, one witness was recalled by Pfizer for relatively short testimony concerning exhibits dealing with financial matters. This was the comptroller of Pfizer and after his testimony all defendants rested.

The case was submitted to the jury at 3:45 p.m. on December 28, 1967. The jury suspended its deliberation at 10:15 p.m. that night and resumed at 9:30 a.m. the following morning.

During its deliberation, the pjury asked for and was given a copy of the Court's charge, the charts used by the government in summation, the charts showing the share of Parke Davis in the broad spectrum antibiotics market, and the evidence referred to in the Court's charge as to the dosages, prices and market techniques of Parke Davis.

The jury returned a verdict of guilty on all three counts as to each defendant on December 29, 1967 at 9:45 p.m.

3. Reversal of the Convictions

The judgment of conviction was appealed. The appeal was argued on May 7, 1969. The record on appeal fills 21 printed volumes, covering ~~some 12,500~~ pages.

On April 16, 1970—after the hearing before this Court on the issue of approval of the proposed compromise—the Court of Appeals handed down its decision, reversing the judgments of conviction and directing a new trial. 426 F.2d 32. Judge Moore wrote the poinion; Judge Friendly concurred; Judge Hays dissented.

The reversal was for errors in the charge of the Court; whether the evidence was sufficient to support the conviction was not decided nor were any questions of patent law decided.

The Court noted that "the government's case, insofar as actual proof is concerned, rests almost entirely upon oral and written statements from defendants themselves. * * * the facts may be said to be virtually undisputed".

The Court placed great stress on the denials of the officers of the three defendants that any agreements as charged in the indictment were made at their meetings; the Court also stressed that the documents agreed to at the meetings showed nothing illegal. The Court stated that because

conviction thus depended on the drawing of inferences by the jury contrary to this evidence, "the importance of instructions cannot be overemphasized".

The errors in the Court's charge were in summary as follows:

a. proper attention was not given to the "key issue", namely, the specific conspiracy charged, but the jury was permitted to infor conspiracy from the course of conduct shown by all the evidence;

b. the testimony of McKeen, Malcolm and Schwartz as to their meetings was "vital to any pury decision as to the existence of a conspiracy" but the testimony was "slighted and rather deprecated" in the charge;

c. by failing to explain that the Patent Office proceedings were only relevant to a consideration whether Pfizer and Cyanamid had agreed to exclude others at their November 1953 meetings, the charge "virtually diverted" the indictment 'from an antitrust conspiracy case to a patent fraud case";

d. the jury's attention was "diverted" to an "inflammatory" issue, namely, whether there were "unreasonably high prices" (it is not clear whether this issue was considered irrelevant or whether it was felt to have been overemphasized in the charge);

e. the jury was improperly limited in considering the "all-important" evidence as to Parke Davis; there was no explanation of the significance of the Parke Davis evidence; and defendants were improperly restricted in argument from such evidence;

f. an "incorrect" interpretation was made of the November 1955 Bristol-Squibb-Upjohn agreements;

these had no such "limitation on Squibb and Upjohn which barred them from manufacturing" as the Court charged; and

g. there should have been, but were not, "the clearest instructions that the jury should not consider Bristol's part in any of the events prior to December 14-15, 1955 as proof of Bristol's being in any conspiracy".

While Judge Hays voted to affirm and found the evidence for the government "sufficient" in the "perspective" of a "limited scope of review" he did note that such evidence was "not overwhelming".

E. Commencement of the Civil Actions

The first assertions of treble damage claims were by defendants filing counterclaims in patent infringement actions brought by Pfizer and Cyanamid.

The first infringement actions by Pfizer were against Bristol, Squibb,, and Upjohn; these (to which reference has been made above) were brought on the day the Conover patent issued and, as noted, were settled in December 1955.

Pfizer brought no other such actions until October 1960 but after that date and over the next five years Pfizer brought some 30 infringement actions on the Conover patent. A list of these actions is Appendix F to the first opinion of the Sixth Circuit (363 F.2d at 817).

One of these infringement actions was commenced by Pfizer on June 4, 1964 in this Court against the City of New York. On July 1, 1964, the City filed an answer containing a counterclaim against Pfizer and against Cyanamid, Bristol, Squibb and Upjohn as additional defendants. This counterclaim asserted a claim for treble damages for violation of the antitrust laws, based on the charges in the

indictment. The counterclaim in substantial part is word for word copied from the indictment.

There may have been such a counterclaim earlier in infringement actions brought by Pfizer and by Cyanamid. The counterclaim by the City of New York on July 1, 1964 is the first of the similar claims in the actions now proposed to be settled.

In three patent infringement actions brought by Pfizer, treble damages antitrust counterclaims were filed by defendants respectively on September 30, 1965, on August 23, 1966 and on June 26, 1967. These referred to the Federal Trade Commission proceedings and to the indictment.

The first action commenced by a plaintiff asserting treble damage antitrust claims against defendants was that of the State of Texas commenced on August 4, 1967 in the Northern District of Texas. Counsel for Texas included some attorneys who were acting for the City of New York in the Pfizer infringement action; it was in this latter action that treble damages claims had been asserted on July 1, 1964 as a counterclaim. The complaint in the action by Texas asserted claims on behalf of a class consisting of the State and all cities and counties in the state which had purchased broad spectrum antibiotics.

In the same month, on August 27, 1967, a defendant in another Conover patent infringement action by Pfizer filed a counterclaim asserting treble damage antitrust claims.

On September 18, 1967, two actions asserting antibiotics antitrust claims were commenced in the Central District of California at Los Angeles. One was a class action on behalf of all retail drug stores and othe other was a class action on behalf of all private hospitals.

At the time of the jury verdict on December 29, 1967, there were three actions by plaintiffs and five counterclaims by defendants in which treble damage antitrust claims were alleged on account of purchases of broad spectrum antibiotics.

After the verdict of the jury, something over 140 other and similar actions were commenced.

The claims made in these civil actions are the same as those made by the Commission and in the indictment.

A large number of the actions are brought as class actions under Rule 23(b)(3) of the Federal Rules of Civil Procedure.

The plaintiffs in the actions may be divided into some separate categories, as follows:

a. government entities;

b. wholesale druggists and retail drug stores;

c. private hospitals, Blue Cross associations and the like;

d. purchasers of antibiotics for uses other than as medicine for human beings, for example, animal feed, animal medication and the like; and

e. all others (a miscellaneous group).

It may be useful to describe more fully the actions by government entities.

Each state, Puerto Rico and the District of Columbia has commenced a separate action, except for Delaware and Nevada.

Delaware is an intervenor plaintiff in an action commenced by City of Philadelphia and City of Detroit in the Eastern District of Pennsylvania (68 Civ.144 there) and transferred here (68 Civ. 4298 here).

Nevada has not commenced an action nor has it intervened in any action.

In addition to actions commenced by states, a number of cities and counties have commenced their own actions against defendants. These are as follows (file numbers are those in this Court):

Baltimore	(68 Civ. 4325)
Boston	(68 Civ. 4354)
Chicago	(69 Civ. 901)
Denver	(68 Civ. 4930)
Kansas City, Missouri	(69 Civ. 2861)
Los Angeles County	(68 Civ. 4341)
Memphis	(68 Civ. 1807)
Nashville and Davidson County	(69 Civ. 899)
New York City	(64 Civ. 1742; counterclaim)
Philadelphia and Detroit	(68 Civ. 4298)
San Francisco County and City	(68 Civ. 4274)

There are a number of government entities which are intervenor plaintiffs in the action of City of Philadelphia and City of Detroit. Delaware has already been mentioned. The following cities are intervenor plaintiffs in that action:

Akron	Lansing
Buffalo	Madison Heights
Cleveland	Pittsburgh
Dearborn	Santa Clara
Honolulu	Tampa

The following counties are intervenor plaintiffs in that action:

Allegheny (Pa.)
Erie (New York)
Honolulu (Hawaii)
Summit (Ohio)

The following other government entities are intervenor plaintiffs in that action:

Township of Redford (Mich.)

Board of Education of the Black Horse Pike Regional School District (N. J.)

(The City of Flint, Michigan, was an intervenor plaintiff in that action but has indicated that it prefers to participate in the settlement as a member of a class represented by the State of Michigan in its action (69 Civ. 898 here).)

F. The Offer of Settlement Made by Defendants

Under date of February 6, 1969 (later modified under date of May 9, 1969) the defendants made a written offer of $100,000,000 in settlement of *all* of the following claims:

"A. Claims of states, counties, cities and their political subdivisions and agencies and any other governmental entities (excluding the Federal Government), arising out of their purchases or out of payments to or for the benefit of recipients of welfare or other aid;

"B. Claims of wholesalers, retailers and individual consumers arising out of their purchases, including claims of states as parens patriae on behalf of their citizens or on behalf of classes including the state as a consumer and all other consumers in the state."

It will be seen that this offer is addressed to claims asserted by government entities (A. above) and by wholesale druggist, retail drug stores and "individual consumers" (B. above).

(At the same time, as already noted, defendants offered a sum in settlement of all claims of private hospitals and like claims; that offer is separate, not involved in the present application, and will not be referred to again.)

The offer of settlement of February 6, 1969 (modified May 9, 1969) was contained in a printed document which set out the general procedural steps contemplated; this document will be sometimes referred to as the "settlement plan".

(A paper dated December 4, 1969 and signed by counsel to defendants was handed at some point to the Court. This paper changes the date "February 6, 1972" in line 17 of page 3 of the settlement plan to "December 31, 1972".)

The procedure set out in the settlement plan was, in brief, that appropriate actions would be determined to the maintained as class actions; that the required (Fed.R.Civ.P. 23(c) (2)) notices with option to be excluded from the class would be directed to all class members; that if exclusions were "substantial and material" defendants could withdraw; that if defendants should go forward with the settlement, the $100,000,000 settlement figure would be reduced appropriately to reflect the exclusion from class membership; that any plaintiff accepting the settlement could present to the Court a Proposed Plan for the allocation of the global settlement amount; that if all plaintiffs did not agree on a common Plan, then defendants might elect to proceed with any Proposed Plan or modification thereof; that the proposed compromise embodied in the agreed common Plan or the Plan elected by defendants would be submitted to the Court for approval under Rule 23(e) of the Federal Rules of Civil Procedure; that administrative and other costs incurred in the settlement procedure should be paid from the settlement amount; and that if the settlement were approved, all claims covered thereby would be "satisfied or otherwise terminated".

G. Court Proceedings on the Proposed Compromise

1. The May 26, 1969 Order

The offer of settlement having been accepted in principle by nearly all the plaintiffs to which it was addressed, an order was filed on May 26, 1969 which began the administration contemplated by the offered settlement. This order was made after notice to counsel for all parties affected and after a hearing.

The order treated the settling plaintiffs in two groups: (1) the states, Puerto Rico and the District of Columbia (often referred to collectively as "the states"); and (2) wholesalers and retailers.

As to the group (1) plaintiffs, the May 26, 1969 order provided a "temporary national class action" (West Virginia v. Pfizer, 68 Civ. 240 in this Court) from which any of the plaintiff states *not* accepting the offer of settlement could by notice exclude themselves. Alternatively, any state as defined in the order) which on or before June 10, 1969 filed with the Clerk of this Court a statement in writing that it accepted the offer of settlement but did not wish to become a member of the "temporary national class" could maintain its action as a class action and become an accepting state without having been included in the "temporary national class". A number of states accepted the offer of settlement under this alternative procedure. It was provided that as to the states accepting the offer of settlement, each action commenced by them was to be maintained as a class action (Fed. R. Civ. P. 23(c) (1)) for two classes, described in detail in the order but in summary as follows: (a) state, county, and city hospitals and other institutions; and (b) individual members of the consuming public who brought antibiotics in the state.

The May 26, 1969 order provided that city and county government entities which as plaintiff or intervenor plaintiff had pleaded by June 10, 1969 a class claim on behalf of consumers resident within their territorial limits could maintain a class action as proper representatives of the class.

As to the group (2) plaintiffs, the May 26, 1969 order provided that those actions commenced by wholesale druggists and retail drug stores which had accepted the offer of settlement were consolidated as the "consolidated wholesaler-retailer class action". The actions so consolidated were listed in the order; as to them the caption usually employed is that of Alpine Pharmacy, Inc. (69 Civ. 559 here), the first in alphabetical order. It was determined that the consolidated action was to be maintained as a class action. The members of the class were specified to be all purchasers of broad spectrum antibiotics in any of the states who bought "for resale at wholesale or retail". The order provided that the plaintiffs and class members in the consolidated action were to be represented by a committee of counsel comprised of all counsel then of record in the actions consolidated.

The May 26, 1969 order stated that the class action determinations and the classes established were for the purpose of administering the proposed settlement.

2. Acceptances of Settlement Offer by Government Entities

The May 26, 1969 order was directed to the states as notice to members of the "temporary national class" (Fed. R.Civ.P. 23(c) (2)) and copies of the order were sent to each member of the class.

All the states accepted the offer of settlement except California, Hawaii, Kansas, North Carolina, Oregon, Utah and Washington.

It will be remembered that Nevada did not commence an action nor intervene in an action. Nevada accepted the settlement offer, however, because it did not elect to be excluded from the "temporary national class" after service on it of the May 26, 1969 order. For purposes of administration of the settlement offer, Nevada, its institutions and consumers, are members of classes represented in the class action, West Virginia v. Pfizer (68 Civ. 240 here).

All the other government entities accepted the settlement offer except Kansas City (Missouri) which excluded itself for the settlement by notice filed June 10, 1969.

3. Notices Under Rule 23(c) (2)

Having determined that certain actions were to be maintained as class actions, it was then necessary to direct to members of the classes the notice required by Rule 23(c) (2).

The May 26, 1969 order had instructed the class representatives to submit drafts of notices. The Court then prepared the notices and, by orders filed June 16, 1969 (and in a few actions modified by later orders), these were directed to be sent out.

As to the class actions by government entities, two orders were filed in each such action in which two classes, institutions and consumers, were represented and one order was filed in each such action in which one class, consumers, was represented.

The order as to institutional class members directed notice by first class mail on or before June 26, 1969 to all government entities and institutions within the state. The mailing list of class members was to be supplied by the parties, usually the class representative. The notice described the situation generally and included a copy of the settlement plan. The class members were

given until August 1, 1969 to exclude themselves from the class.

The order as to consumer class members directed that notice be given by publication of the prescribed form of notice on or about July 1, 1969 in every daily English and Spanish language newspaper of general circulation in the state. The consumer class members were given until August 1, 1969 to exclude themselves from the class. They were also notified that if they wished to make a claim in the settlement they were required to file by August 16, 1969 a verified statement or a statement certified by the supplier. The notice to consumers also contained this statement: "If you do not make an individual claim by August 16, 1969, that will constitute an authorization to the Attorney General [in the District of Columbia and in some other government entities the chief law officer was referred to by different title] to utilize whatever money he hay recover as your representative for the benefit of the citizens of your State in such manner as the Court may direct."

As to the consolidated wholesaler-retailer class action, one order as to notice was filed on June 16, 1969 and modified in one respect by order filed June 18, 1969. Notice in the prescribed form was directed to be given by first class mail on or before June 19, 1969. The names and addresses of the class members were to be obtained by using the mailing list of Clark-O'Neill, Inc., 1 Broad Avenue, Fairview, New Jersey 07022, a business engaged in maintaining a mailing list of wholesale drug houses and retail drug stores in the United States. The wholesaler-retailer class members were given until August 1, 1969 to exclude themselves from the class. They were also given until August 16, 1969

to file a claim in the settlement; a claim form to be verified was annexed to the notice.

The notices were duly given as provided in the orders. The notices were in all instances signed by the Clerk and those sent by mail were sent in penalty envelopes with the Clerk's return address. All notices of exclusion and all claims were required to be addressed to the Clerk. Counsel for the parties, Clark-O'Neill, Inc. and an advertising agency assisted the Clerk. Defendants were directed in the orders to advance the necessary funds (the newspaper notices cost about $130,000, to be reimbursed as an expense of the settlement if the settlement proposed were finally approved by the Court.

4. Problems in California

As noted above, the State of California chose to reject the offer of settlement. At the time of the Rule 23(c) (2) notices, Los Angeles County and San Francisco County had chosen to accept the offer of settlement; so also had the City of Santa Clara, California, an intervenor plaintiff in the City of Philadelphia and City of Detroit action.

Out of this situation arose the issue whether within a state rejecting the settlement offer, a smaller political subdivision (county or city) having its own action against defendants could maintain such action as a class action and accept the offer of settlement. The State of California protested that it could not be done.

Los Angeles County, wishing to accept the settlement, sought to amend its complaint so as to allege claims on behalf of consumers within its geographical limits. California opposed. This Court ruled that within a rejecting state a county, but not a city, could maintain a class action

independent of the state. By order filed June 18, 1969, the amendment sought by Los Angeles was allowed and a determination made that Los Angeles could maintain its action as a class action. By separate order filed the same date, Rule 23(c) (2) notice was directed to be given to the consumer class represented by Los Angeles County by publication in newspapers there. A stay sought by California was denied, as well as a statement under 28 U.S.C. § 1292(b).

San Francisco (a county as well as a city), wishing to accept the settlement, had, by order on stipulation filed April 29, 1969, amended its complaint to assert claims on behalf of consumers within its geographical limits. By order filed June 19, 1969, it was determined that the action of San Francisco could be maintained as a class action. By separate order filed the same date, Rule 23(c) (2) notice was directed to be given to the consumer class represented by San Francisco by publication in newspapers there.

California applied to the Court of Appeals for a stay pending an application for an extraordinary writ. The Court of Appeals denied a stay on June 25, 1969 (California v. Wyatt, MR—3097; (Hays, Feinberg, CJJ., Jameson, D.J.). Mr. Justice Harlan thereafter denied a stay.

The principle of the ruling (as stated above) dictated that Santa Clara, a city and not a county, should not maintain a class action on behalf of consumers within its geographical limits. By order filed June 19, 1969, it was so provided and no Rule 23(c) (2) notice was given to any consumers within the geographical limits of Santa Clara.

5. Responses to the Rule 23(c) (2) Notices

Notices of exclusion were filed by 61 members of the classes consisting of government entities and institutions.

Notices of exclusion were filed by 42 members of the classes consisting of individual purchasers of antibiotics.

Notices of exclusion were filed by about 1500 members of the class consisting of wholesalers and retailers. In connection with the number of exclusions from this class, it may be noted that under date of June 27, 1969 the Executive Director of the American Pharmaceutical Association wrote about the settlement offer to executives of state pharmaceutical associations. Among other things, this letter stated that American Pharmaceutical Association "has urged pharmacists not to submit claims against the settlement funds unless actual damage can be demonstrated * * *" and further that "adverse public reaction could well result if pharmacists obtain a share of the settlement funds and do not pass amounts received on to patients".

Claims were filed by about 38,000 members of the classes consisting of individual purchasers of antibiotics. The face amount of the purchases made by these claimants is something in excess of $16,500,000.

Claims were filed by somewhat more than 4100 members of the class consisting of wholesalers and retailers. The face amount of the purchases made by these claimants is in excess of $345,000,000.

6. Proposed Plans of Allocation

The defendants did not elect to withdraw from the settlement by reason of the exclusions from the various classes. The were given such withdrawal right by paragraph III.B of the settlement plan. They elected to go forward with the settlement.

The settlement plan provided that any plaintiff accepting the settlement could file by a date determined by a formula (September 2, 1969, it appears) a "Proposed Plan for the

Allocation of the Fund". The allocation is of importance, of course, because the offer of defendants was of an unallocated total sum for all plaintiffs and all classes.

Proposed Plans of Allocation were filed as follows:

a. by counsel for the State of Alabama and for 29 other states, Puerto Rico, the District of Columbia, Chicago, New York City, Memphis and Nashville (the "Alabama Plan");

b. by counsel for the State of Connecticut and for 5 other states, Baltimore, and Denver;

c. by counsel for Los Angeles County;

d. by counsel for the City of Philadelphia and City of Detroit and for intervenor plaintiffs in that action, including the State of Delaware;

e. by counsel for the County and City of San Francisco;

f. by the committee of counsel in the consolidated wholesaler-retailer class action; and

g. by counsel for the State of Vermont.

7. The Alabama Plan

This plan will be described in some detail because, with modifications, it was later adopted by defendants and moreover was the most comprehensive of the plans filed.

The Alabama Plan divided the $100,000,000 sum offered between all the claims asserted in all the relevant actions, even though some plaintiffs had rejected the settlement offer. The division having thus been made, the Plan affords a basis for reducing the $100,000,000 amount to reflect the claims represented by plaintiffs rejecting the settlement offer. Provision for such reduction was made in paragraph III.D of the settlement plan.

The theory of the Alabama Plan is that claims of government entities on account of institutional purchases and welfare reimbursements are entitled to first priority on the settlement fund. The reasoning is that the dollar amount of these purchases and payments can be calculated with reasonable accuracy and the damages, on the assumption of liability, are direct and provable. The dollar amount of purchases by individual consumers unreimbursed (that is, not welfare patients) are not so easily calculated and as to claims of wholesalers and retailers these may be affected, among other things, by the "pass-on" defense.

The allocation for institutional purchases starts with the dollar amount of sales of antibiotics to government entity institutions, wholesalers and retailers for the period believed by the proponents to be relevant. Sales information was supplied by defendants. Some part of the sales to wholesalers and retailers were actually sales through them to government entity institutions as "drop-shipments" by defendants with a handling allowance to the wholesalers or retailers concerned. After adjustment for these sales, it was determined that the dollar amount of sales to government entity instituitions was $121,620,000.

It was then assumed that, absent the claimed antitrust law violations, competitive prices would have been much lower; it was calculated that the prices actually charged contained an overcharge of 66⅔%. Allowing for uncertainties in law and in fact, it was concluded that for settlement purposes an overcharge figure of 40%-41% could properly be used. This figure is said to have been used in negotiations which preceded the $100,000,000 offer by defendants. Applying a 41% overcharge figure to the sales figure of $121,620,000 yielded a figure of $49,864,200 or, rounded off, $50,000,000.

During what was felt to be the relevant period, many states, counties and cities had public assistance (welfare) programs under which eligible persons having prescriptions for antibiotics could obtain these from drug stores which in turn would be reimbursed by the public authorities.

It was calculated that $48,600,000 was spent by states, counties and cities as reimbursement to vendors for antibiotics delivered to welfare patients. This calculation was based on information from the Department of Health, Education and Welfare that $900,000,000 had been paid (in the period believed to be relevant) as public assistance for drugs of all kinds. As a result of special studies and of earlier surveys in several localities, it was concluded that about 5.4% or $48,600,000 of the $900,000,000 represented vendor reimbursement for antibiotics. The federal government paid about 50% of the public assistance programs. The proponents believed that claims on account of the 50% public assistance paid by the federal government were not covered by the settlement offer (whether this be true or not need not be, and is not, determined). For allocation purposes, the share paid by states, counties, and cities was used, that is, 50% of $48,600,000, or $24,300,000.

It was then assumed that, absent the claimed antitrust law violations, competitive prices by defendants to vendors (retail drug stores, mainly) would have been lower and reimbursement payment would have been much lower; it was then calculated, but by a different method from that employed for institutional purchases, that the vendor reimbursement sum of $24,300,000 contained an overcharge of 66⅔%; applying the same overcharge figure for settlement purposes of 41% to the vendor reimbursement sum of $24,300,000 resulted in a settlement figure of $9,963,000 or, rounded off, $10,000,000.

The allocation therefore was $60,000,000 to government entities—of which $50,000,000 was for institutional purchases and $10,000,000 for vendor reimbursement.

The allocation of $60,000,000 to government entity claims left $40,000,00 to be divided between (a) claims of wholesalers and retailers and (b) claims of individual unreimbursed purchasers (consumers).

The amount to be allocated to claims of wholesalers-retailers was first determined. The proponents felt that in principle nothing should be allocated to these claims because the members of this class sold nearly all their antibiotics to consumers and passed on any and all overcharge. (This problem was considered in a different context in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S.Ct. 2224, 2 L.Ed.2d 1231 (1968).) It was also taken into consideration by the proponents that the offer of defendants contemplated and the Alabama Plan provided for, payments in settlement to individual purchasers (consumers). The proponents felt that members of the wholesaler-retailer class actually made *more* profits as a result of the assumed violations of law. However, in order to secure the agreement of the wholesaler-retailer class to the settlement, a "nuisance value" allocation of $3,000,000 (a somewhat arbitrary figure) was made to this class.

This left $37,000,000 for the claims of individual purchasers (consumers). It will be remembered that some 38,000 consumers filed claims having a face amount of something in excess of $16,500,000. In this connection, the Alabama Plan (pp. 24, 25) makes these statements:

> "As of midnight August 16, 1969 some 38,000 individual consumers filed claims in accordance with this

Court's July 1, notice. This is the first time that individual consumers—those who actually paid the overcharge caused by a defendant's antitrust violations—will participate in an antitrust settlement. The $37,000,000 fund wil provide a basis for payment of all individual consumer claims and will also provide a surplus from which the indirect benefit contemplated by this Court's July 1 notice may be conferred upon consumers as a whole.

* * * * *

"After payments to individual consumers who have filed claims in accordance with the Court's notice are deducted from each entity's consumer fund, the balance, if any, should be held for distribution in accordance with each entity's internal, or second-stage allocation plan. Most entities joining in this allocation plan will seek court approval in their second-stage allocation plans for an additional period of time within which individual consumers may be permitted to file claims. Others may seek court approval to use the balance of their consumer fund for a public health purpose. This Court has the power, and, of course, should exercise its equitable control over these funds for the benefit of all consumers."

The Alabama Plan, to recapitulate to this point, divided the $100,000,000 as follows:

Government entity claims	
institutional purchases	50,000,000
vendor reimbursement programs	10,000,000
Individual purchaser claims	37,000,000
Wholesaler-retailer claims	3,000,000
	$100,000,000

The next problem in the allocation was to divide the $50,000,000 fund for institutional purchases between the various government entity plaintiffs acting as class repre-

sentatives. This was done by use of the number of hospital beds in institutions of, or represented by, each such plaintiff, applied as a percentage of the total number of hospital beds in the United States and Puerto Rico. Fgures on hospital beds were taken from the American Hospital Association Guide for the years 1955, 1961 and 1967 (as to certain hospital beds in Puerto Rico, figures were taken from the Puerto Rico Hospital Registry, as being more complete). The percentage figure was then obtained for each of the years 1955, 1961 and 1967; the average of these three percentages was used in making the division of the $50,000,000 amount.

A similar problem was the division between government entity plaintiffs in respect of the $10,000,000 vendor reimbursement fund. Some states had no such public assistance programs and thus were excluded from any share of this fund. In dividing the $10,000,000 amount between the states having public assistance vendor reimbursement programs, the basic information was obtained from a yearly publication "Source of Funds Expended for Public Assistance Programs" published by the Department of Health, Education and Welfare, Social Security Administration, Bureau of Public Assistance, Division of Program Statistics and Analysis. This information showed for each state the dollar amount of vendor reimbursement for drugs supplied for each year under public assistance programs, broken down (after 1959) by type of program (that is, Old Age Assistance, Aid to Families with Dependent Children and the like). The special studies and earlier surveys, to which reference has been made, indicated for each type of program the percentage of all drugs attributable to antibiotics. By use of these percentages it could be calculated how much each state spent for antibiotics under vendor

reimbursement programs (where no breakdown by program was available, as in 1959, a slightly different method had to be used). It was then determined what percentages these amounts were of the total amount spent by all states for antibiotics under vendor reimbursement programs. These percentages were then applied to the $10,000,000 amount to determine the share of each state in that amount.

The $37,000,000 which had been allocated to claims of individual purchasers (consumers) had to be divided into the amount applicable to each class of consumers represented by each government entity plaintiff. This division was made on the basis of the percentage of the total population (including Puerto Rico) represented by the population of each government entity plaintiff. For this purpose, the 1960 census was employed.

Before establishing the final division of the $50,000,000 fund for institutional purchases, an adjustment was made for certain institutions which had elected to exclude themselves from the class represented but the beds of which had been included in the data on which a tentative division had been made.

No adjustment was made for wholesaler-retailer or for consumer class members who had elected to exclude themselves from their respective classes.

As already noted, the Alabama Plan allocated $3,000,000 to the claims of the wholesaler-retailer class.

The final allocations of the Alabama Plan for each government entity plaintiff for (A) institutional purchases, (B) vendor reimbursement programs, and (C) consumers are shown on Exhibit "E" to that Plan. The total is not $97,000,000 but $82,615,030. This is because the offered settlement amount had to be reduced under the settlement

plan so as to reflect those government entity plaintiffs who rejected the settlement. This was done by simply excluding the amounts allocated to them of the $100,000,000 total settlement amount. (Doubtless by oversight Kansas City, Missouri was not taken into acount as a separate government entity plaintiff in any of the divisions of the Alabama Plan and no adjustment was made for Kansas City as a plaintiff rejecting the settlement.)

The Alabama Plan, it will be noted, allocates only to *classes* represented by each plaintiff class representative accepting the proposed compromise. Approval of the proposed compromise and dismissal of the actions as far as claims against defendants are concerned will not end the responsibility of the Court and of the class representative plaintiffs. Further plans of allocation to each member of the classes and plans of distribution must be prepared and approved by the Court.

8. The Other Proposed Plans of Allocation

The Plan of Allocation filed by the committee of counsel in the consolidated wholesaler-retailer class action allocated $40,000,000 to the claims of wholesalers and retailers.

The other Plans of Allocation (except that of San Francisco which adopted the allocations of the Alabama Plan) did not allocate anything to the claims of wholesalers and retailers. It was said that anything given to wholesalers and retailers would be a "windfall" to them. Some of the other Plans also differed with the Alabama Plan in that all amounts allocated to government entity plaintiffs and institutions and to consumers were divided on the basis of population, without any special allocation for vendor reimbursement welfare programs.

9. Dispute Over Allocation to Wholesaler-Retailer Class; Result of Negotiations

The settlement plan provided (paragraph III.E(1)) that the parties would use their best efforts to agree upon a common Plan of Allocation of the settlement amount; that failing such agreement, defendants could "elect to proceed with any proposed Plan or modification thereof"; but that if the allocation to any government entity plaintiff under a Plan elected by defendants should be less than under a Plan proposed by that plaintiff, then that plaintiff might "withdraw from the settlement". No similar right to withdraw from the settlement was provided in the settlement plan for the wholesalers and retailers.

A very serious issue was the amount to be allocated to the wholesaler-retailer class. The Plan submitted on behalf of that class, it will be remembered, allocated $40,000,000 to wholesalers and retailers, while the Alabama and San Francisco Plans allocated $3,000,000 and the other Plans nothing at all to that class. An increase in any allocation to the wholesaler-retailer class would have resulted in a decrease by that amount in the allocation to government entity plaintiffs. It was stated for the government entity plaintiffs that they would exercise their right to withdraw from the settlement were the wholesaler-retailer allocation increased at their expense. Counsel for the wholesaler-retailer class, on the other hand, indicated that they considered a $3,000,000 allocation insufficient and that they would oppose approval by the Court of any Plan elected by defendants which provided an allocation to wholesalers and retailers of no more than that amount.

After intensive negotiations, of which the Court was kept generally informed, the issue was decided in a manner acceptable to the government entity plaintiffs and nearly all of the committee of counsel for the wholesaler-retailer class. In summary, defendants agreed to deposit the

settlement amount forthwith in an escrow account; the interest on the amount in escrow would accrue for the benefit of the wholesaler-retailer class, thus increasing by an amount exceeding $8,000,000 the $3,000,000 proposed for that class by allocation in the Alabama Plan.

During the negotiations to agree upon a common Plan, the State of Vermont withdrew its Plan and adopted the Alabama Plan. Agreement was reached among counsel for the government entity plaintiffs that they would abide by the decision of the Court as to the fairness of any Plan among those submitted by government entity plaintiffs which the defendants might elect.

10. Election by Defendants

On October 20, 1969, defendants filed a document, "Election by Defendants to Proceed With a Modified Plan of Allocation". This Election accepts the Alabama Plan in large part but has certain modifications. The chief of these modifications will be mentioned:

a. the Election accepts the aggregate amounts allocated to each government entity plaintiff for all the classes represented but defendants take no position on the division of this aggregate amount by the Alabama Plan into the three separate parts;

b. the Alabama Plan, as noted, failed to take into account the withdrawal from the settlement of Kansas City; a reduction in the settlement amount is made by defendants on account of Kansas City;

c. the Election takes the position that defendants are settling all claims of government entity plaintiffs "for welfare, including any amounts reimbursed by the Federal Government"; this refers to the treatment in the Alabama Plan, as already noted, of payment

by the federal government of 50% of public assistance programs; and

d. the Elecciton includes provision for the deposit by defendants of an escrow fund and explains that this is done so that interest on the escrow fund may be for the benefit of the wholesaler-retailer class, which had found unacceptable the allocation to it in the Alabama Plan.

The amount which defendants undertook in the Elecciton to deposit in escrow for the settlement of all claims asserted in these settling actions was $85,341,215. The comparable figure in the Alabama Plan was $85,615,030 ($82,615,030 from Exhibit "E", page 5, plus $3,000,000 for the wholesaler-retailer class from page 24.)

The $85,615,030 figure from the Alabama Plan had to be reduced by $118,560 to reflect rejection of the settlement by Kansas City. The figure $118,560 for Kansas City was calculated by the hospital bed formula of the Alabama Plan. Reduction by this amount left a figure of $85,496,470.

The settlement plan provided that administrative and other costs of settlement should be paid "from the Fund". An amount of $152,801.29 for past such expenses paid by defendants and an amount of $27,454 for future estimated such expenses were deducted from the settlement amount. The total of the two deductions was $180,255.29 and after such deductions the settlement amount was $85,316,214.71.

A final adjustment of this amount by the addition of $25,000 was made. This $25,000 was added to the amount to be available for the wholesaler-retailer class and was the result of a special negotiation between certain of the counsel for some of the interested parties. The addition

of the $25,000 carried the settlement amount to $85,341,-214.71, rounded off to $85,341.215.

The calculation of the settlement amount is explained in some detail in a footnote on pages 3-4 of defendants' "Election".

Of the escrow amount of $85,341,215, the amount for the wholesaler-retailer class was $3,013,939 and the amount for classes represented by government entity plaintiffs was $82,327,276.

11. The Escrow Order and Agreement

On the day defendants filed their Election, October 20, 1969, the Court filed an order approving the Escrow Agreement and directing defendants to deposit $85,341,215 with the Escrow Agent. This has been done.

The Escrow Agreement is dated October 20, 1969 and is between the five defendants and The Chase Manhattan Bank as Escrow Agent. A brief reference will be made to some of its principal provisions:

(a) the escrow fund is to be invested "to obtain the best interest yields consistent with safety", etc.;

(b) if there is a final order approving the proposed compromise by November 23, 1970, then on that date the escrow fund shall be divided into two separate such funds, one of $82,327,276 for classes represented by government entity plaintiffs and the other of the balance of the escrow fund for the wholesaler-retailer class;

(c) if there is no final order by November 23, 1970, then the division into two separate funds will take place on December 23, 1970. The effect is thus to give the wholesaler-retailer class the benefit of an additional month's interest on the entire escrow fund;

(d) after division into separate funds, interest on each fund accrues for the benefit of that fund; and

(e) when, as and if there is a final order approving the settlement, the separate funds will be paid over by the Escrow Agent for distribution to class members as directed in orders of the Court.

12. Withdrawal of Los Angeles and San Francisco; Addendum to Election of Defendants

For reasons as to which one may only speculate, Los Angeles County and San Francisco County decided to withdraw from the settlement; on December 15, 1969 they filed notices of withdrawal. They purported to exercise the right of withdrawal provided in paragraph III.-E.(1) of the settlement plan and defendants have not contested their withdrawal.

The Election of defendants filed October 20, 1969 had provided for $2,313,645 for claims in the Los Angeles action and $425,825 for claims in the San Francisco action. These aggregate $2,739,470.

On January 20, 1970, defendants filed a document, "Addendum to Election by Defendants to Proceed With a Modified Plan of Allocation". This document contained a proposal by defendants that the settlement amount of $85,341,215 be reduced by $2,739,470 for the Los Angeles and San Francisco withdrawals. This would mean that $82,601,745 of the principal escrow amount of $85,341,215 is being held as the principal amount in escrow for settlement of all claims in these actions.

It may be noted that in response to newspaper notices published in Los Angeles and San Francisco, 541 claims were filed by consumers resident in Los Angeles and these

had a face amount of $249,996; there were 132 such claims filed by residents of San Francisco and these had a face amount of $37,418.

13. Notices Under Rule 23(e)

At the request of counsel for 31 government entity plaintiffs which had accepted the proposed compromise, an order was made and filed on November 18, 1969 requiring all parties to the 66 settling actions to show cause on December 5, 1969 why notice should not be sent to all class representatives and class members, in form as annexed to the order. The proposed forms of notices were of a hearing to consider whether the proposed compromise should be approved by the Court (Fed.R.Civ.P. 23(e)).

The return of the order to show cause was postponed to December 15, 1969. On that date, all interested parties were heard. While there was no agreement on the forms of notices, all parties in all actions agreed that notices should be sent out and a hearing held on whether to approve the proposed compromise. (An attorney for certain members of the wholesaler-retailer class (not plaintiffs in any action) objected to any notices or any hearing until it had been determined what amounts would be received in settlement by each member of that class.)

There was further discussion of the forms of notices at hearings held on January 13, 19 and 29, 1970. On January 27, 1970, forms of notices to class members as redrafted by the Court were sent to all counsel who had attended the hearing on December 15, 1969. An explanatory memorandum was also sent and notice was given that the redrafts would be discussed with counsel on February 2, 1970.

The discussion of the forms of notice took place on February 2, 1970, as advised in the explanatory memorandum sent out as stated above.

By an order filed February 4, 1970, the Clerk was directed to mail (by February 24, 1970) a copy of a notice (in the for annexed to the order) to all members of the consumer classes in each of the actions brought by a government entity who had filed claims with the Clerk in response to the notices published on or about July 1, 1969; by the same order the Clerk was directed to arrange for publication of a notice to consumers (in the form annexed to the order) in every newspaper of general circulation (English and Spanish) in each of the government entities accepting the proposed compromise. This newspaper publication is as extensive as that in July 1969. The defendants were anxious that there be such widespread publication; it did not seem, however, that the settlement fund should be burdened with the expense of so extensive a publication. The order provided, therefore, that the publishing costs, to be advanced by defendants, would be reimbursed only to the extent of the cost of publishing in the two newspapers of largest circulation within the territory of each government entity.

By an order filed February 4, 1970, the Clerk was directed to mail (by February 24, 1970) a copy of a notice (in the form annexed to the order) to each member of the wholesaler-retailer class as more specifically described in the order.

By orders filed February 6, 1970 in each of the actions by a government entity in which a class of government institutions is represented, the Clerk was directed to mail (by February 24, 1970) a copy of a notice (in the form annexed to the order) to the chief law officer of each plaintiff, to each county, city or other government entity within the plaintiff, and to each hospital district, hospital and other

institution—all as more specifically provided for in the respective orders.

All of the notices advised that a hearing on the proposed compromise would be held on March 24, 1970.

It may be noted that each settling action is separate and is the subject of a separate compromise by payment of a separate amount in compromise; the offer of defendants is such, however, that unless there is a settlement of all of thes 66 actions there can be no settlement of any of them. For this reason, as well as for convenience and economy, the hearing was designated to include all actions.

The published newspaper notices to consumers were made shorter than the other notices. This was because such notices were primarily directed to members of the consumer class who had not filed claims and whose interests in the hearing might fairly be regarded as minimal. Expense was also a consideration. Among other things, the newspaper notices advised of the time, place and purposes of the hearing; gave a general description of the actions; advised in what documents on file the details of the proposed compromise could be found; noted that the amount proposed to be paid by defendants in each of the actions "must be divided with the Court's approval among all the claims represented in the actions including those of individual consumers"; and stated that these amounts were subject to reduction for administrative expenses and also "for fees and expenses (as later allowed by the Court) of counsel for plaintiffs in the actions". The published newspaper notices also contained this statement:

> "According to notices already given with the Court's approval, each state and other governmental entity participating in the settlement is authorized to use for the benefit of its citizens in such manner as directed by the

> Court whatever money is recovered on account of claims of consumers represented in its action who failed to file an individual claim by August 16, 1969."

The notices sent by mail to consumers who had filed claims and to all members of other classes were in more detail.

The notices sent by mail to consumers contained this statement:

> "Notices of the pendency of the class actions were widely published in July 1969. These notices advised that each member of a consumer class could take part in the settlement in one of two ways: first, he could file a claim for direct participation in the settlement fund or, second, he could remain in the class but not file a claim, this latter choice constituting an authorization for use for the benefit of all citizens of the government entity involved (in such manner as the Court might direct) of whatever money might be received on account of his purchases of broad spectrum antibiotic drugs."

Attached to the mailed notices to consumers was a list of the separate amounts proposed to be paid by defendants with respect to the total claims represented in each action. Reference was also made to the division of these amounts in the Alabama Plan as between the three different types of claims already explained, and that defendants had taken no position as to that division. It was stated: "The further allocation into sums payable on account of the three types of claims will, however, be considered at the March 24, 1970 hearing as part of the proposed compromise". The same information was given in mailed notices to government institutional class members in government entity actions except that instead of a list of amounts to be paid by defendants in each of the 66 settling actions they were ad-

vised of the separate amount to be paid by defendants in their action and how this was divided in the Alabama Plan as between the three types of claims.

The mailed notice to members of the wholesaler-retailer class contained this statement:

> "At the hearing on March 24, 1970 the Court will consider whether to enter an order adjudicating that any wholesaler or retailer who failed timely to request exclusion from the class and failed timely to mail a proof of claim has no claim against defendants with respect to purchases of broad spectrum antibiotic drugs and no claim against the settlement fund."

Proofs of the mailing of notices and of the publication of notice in newspapers have been filed.

14. The Settlement Amount Offered and Its Proposed Allocation

It may be useful to recapitulate at this point and to set out the amounts proposed to be paid by defendants in settlement of each action as well as the details of the further allocation proposed, recognizing that whatever allocation is approved at this stage must be followed by a further division between members of the several classes.

The amount to be paid to the wholesaler-retailer class is $3,013,939 plus interest on the escrow fund to November 23 or December 23, 1970.

The amount to be paid on account of all claims of all parties plaintiff, and of al classes represented, in the actions of government entities accepting the settlement (numbered 1 through 51 of Exhibit A) is $79,557,269 (subject to some downward adjustment on account of expenses of the settlement not already deducted).

The amounts proposed by defendants to be paid in respect of the claims in each separate action will now be given, and also the proposed allocation of those amounts in the Alabama Plan as between the three classes: (a) government entities on acount of institutional purchases ("institutional purchases"), (b) government entities on account of vendor reimbursements under public assistance programs ("vendor reimbursements"), and (c) government entities on account of individual unreimbursed purchasers ("consumers"). The amounts to be paid by defendants are taken from their Election and its Addendum, with some adjustments later made by them and explained at the end of this section.

The amounts shown as allocated to the three classes will in total be slightly more than the amount shown as proposed to be paid by defendants in each action. This is because the allocations were made in the Alabama Plan without any deduction for administrative expenses payable from the settlement amounts. The same *ratio* shown by the allocations, however, is proposed to be applied to the exact amounts payable by defendants in each action.

It should be noted that the amounts shown as proposed to be paid by defendants are subject to further adjustments downward on account of administrative expenses as finally approved by the Court.

1. The State of Alabama v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 1099

$2,016,855

institutional purchases	$ 1,355,000
vendor reimbursements	
consumers	666,000
	$ 2,021,000

2. State of Alaska v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 2357
$63,969

institutional purchases	$ 10,000
vendor reimbursements	6,000
consumers	48,100
	$ 64,100

3. The State of Arizona and The County of Maricopa v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 1698
$530,310

institutional purchases	$ 265,000
vendor reimbursements	
consumers	266,400
	$ 531,400

4. The State of Arkansas v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 778
$860,831

institutional purchases	$ 500,000
vendor reimbursements	
consumers	362,000
	$ 862,000

5. The State of Colorado v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 5141
$761,735

institutional purchases	$ 395,000
vendor reimbursements	113,000
consumers	255,300
	$ 763,300

6. City and County of Denver v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4930
$204,480

institutional purchases	$ 105,000
vendor reimbursements	
consumers	99,900
	$ 204,900

7. State of Connecticut v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4323
$932,084

institutional purchases	$ 215,000
vendor reimbursements	201,000
consumers	518,000
	$ 934,000

8. City of Philadelphia and City of Detroit v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4298

State of Delaware:
$158,175

institutional purchases	$ 65,000
vendor reimbursements	1,000
consumers	92,500
	$ 158,500

Tampa, Florida:
$130,232

institutional purchases	$ 75,000
vendor reimbursements	
consumers	55,500
	$ 130,500

Honolulu, Hawaii:
$113,367

institutional purchases	$ 10,000
vendor reimbursements	
consumers	103,600
	$ 113,600

Detroit, Michigan:		
$539,292		
institutional purchases	$	200,000
vendor reimbursements		
consumers		340,400
	$	540,400
Dearborn, Michigan:		
$22,154		
institutional purchases	$	
vendor reimbursements		
consumers		22,200
	$	22,200
Lansing, Michigan:		
$22,154		
institutional purchases	$	
vendor reimbursements		
consumers		22,000
	$	22,200
Madison Heights, Michigan:		
$7,385		
institutional purchases	$	
vendor reimbursements		
consumers		7,400
	$	7,400
Township of Redford, Michigan:		
$14,770		
institutional purchases	$	
vendor reimbursements		
consumers		14,800
	$	14,800

Buffalo, New York: $107,080		
institutional purchases	$	
vendor reimbursements		
consumers		107,300
	$	107,300
Erie County, New York: $380,518		
institutional purchases	$	255,000
vendor reimbursements		19,000
consumers		107,300
	$	381,300
Akron, Ohio: $59,079		
institutional purchases	$	
vendor reimbursements		
consumers		59,200
	$	59,200
Cleveland, Ohio: $262,061		
institutional purchases	$	85,000
vendor reimbursements		
consumers		177,600
	$	262,600
Summit County, Ohio: $44,309		
institutional purchases	$	
vendor reimbursements		
consumers		44,400
	$	44,400
Philadelphia, Pennsylvania: $935,078		
institutional purchases	$	530,000
vendor reimbursements		
consumers		407,000
	$	937,000

Pittsburgh, Pennsylvania: $121,850	
institutional purchases	$
vendor reimbursements	
consumers	122,100
	$ 122,100
Allegheny County, Pennsylvania: $221,744	
institutional purchases	$ 15,000
vendor reimbursements	
consumers	207,200
	$ 222,200
9. The District of Columbia v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 2778 $450,474	
institutional purchases	$ 295,000
vendor reimbursements	1,000
consumers	155,400
	$ 451,400
10. The State of Florida v. Chas. Pfizer & Co., Inc., et al. 67 Civ. 4143 $3,125,706	
institutional purchases	$ 1,813,530
vendor reimbursements	364,000
consumers	954,600
	$ 3,132,130
11. The State of Georgia v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 153 $2,667,543	
institutional purchases	$ 1,870,125
vendor reimbursements	
consumers	802,900
	$ 2,673,025

12. State of Idaho v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 897	
$366,148	
institutional purchases	$ 230,000
vendor reimbursements	
consumers	136,900
	$ 366,900
13. The State of Illinois v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 273	
$4,492,660	
institutional purchases	$ 2,154,593
vendor reimbursements	1,019,000
consumers	1,328,300
	$ 4,501,893
14. The City of Chicago v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 901	
$804,846	
institutional purchases	$ 85,000
vendor reimbursements	
consumers	721,500
	$ 806,500
15. The State of Indiana v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 3157	
$2,534,691	
institutional purchases	$ 1,390,000
vendor reimbursements	199,000
consumers	950,900
	$ 2,539,000
16. The State of Iowa v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4297	
$1,647,015	
institutional purchases	$ 815,000
vendor reimbursements	273,000
consumers	562,400
	$ 1,650,400

17.	The Commonwealth of Kentucky v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4453	
	$1,339,148	
	institutional purchases	$ 515,000
	vendor reimbursements	209,000
	consumers	617,900
		$ 1,341,900
18.	The State of Louisiana v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 1380	
	$2,514,133	
	institutional purchases	$ 1,630,000
	vendor reimbursements	227,000
	consumers	662,300
		$ 2,519,300
19.	The State of Maine v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 916	
	$244,613	
	institutional purchases	$ 49,016
	vendor reimbursements	
	consumers	196,100
		$ 245,116
20.	The State of Maryland v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4324	
	$945,357	
	institutional purchases	$ 395,000
	vendor reimbursements	112,000
	consumers	440,300
		$ 947,300
21.	The Mayor and City Council of Baltimore v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4325	
	$601,165	
	institutional purchases	$ 410,000
	vendor reimbursements	
	consumers	192,400
		$ 602,400

22. The Commonwealth of Massachusetts v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4355
$2,638,078

institutional purchases	$ 925,000
vendor reimbursements	812,000
consumers	906,500
	$ 2,643,500

23. City of Boston v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4354
$696,169

institutional purchases	$ 425,000
vendor reimbursements	132,000
consumers	140,600
	$ 697,600

24. The State of Michigan v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 898
$2,924,415

institutional purchases	$ 1,742,725
vendor reimbursements	
consumers	1,187,700
	$ 2,930,425

25. The State of Minnesota v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 735
$2,447,743

institutional purchases	$ 1,314,173
vendor reimbursements	443,000
consumers	695,600
	$ 2,452,773

26. The State of Mississippi v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 1625
$1,379,455

institutional purchases	$ 938,290
vendor reimbursements	
consumers	440,000
	$ 1,382,290

27. The State of Missouri v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 5180
$2,004,920

institutional purchases	$ 1,081,440
vendor reimbursements	47,000
consumers	880,600
	$ 2,009,040

28. The State of Montana v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 1278
$237,412

institutional purchases	$ 50,000
vendor reimbursements	51,000
consumers	136,900
	$ 237,900

29. The State of Nebraska v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 2106
$682,437

institutional purchases	$ 354,240
vendor reimbursements	41,000
consumers	288,600
	$ 683,840

30. The State of New Hampshire v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4878
$272,241

institutional purchases	$ 100,000
vendor reimbursements	47,000
consumers	125,800
	$ 272,800

31. State of New Jersey v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4929
$2,643,368

institutional purchases	$ 1,200,000

vendor reimbursements	213,000
consumers	1,235,800
	$ 2,648,800

32. State of New Mexico v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4326
$547,275

institutional purchases	$ 255,000
vendor reimbursements	101,000
consumers	192,400
	$ 548,400

33. The State of New York v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 845
$3,901,881

institutional purchases	$ 1,965,000
vendor reimbursements	328,000
consumers	1,616.900
	$3,909,000

34. Chas. Pfizer & Co., Inc. v. The City of New York, et al. 64 Civ. 1742
$5,618,054

institutional purchases	$ 3,750,000
vendor reimbursements	296,000
consumers	1,583.600
	$ 5,629,600

35. The State of North Dakota v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 1626
$242,003

institutional purchases	$ 40,000
vendor reimbursements	73,000
consumers	129,500
	$ 242,500

36. State of Ohio v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 2019	
$3,755,949	
institutional purchases	$ 1,676,068
vendor reimbursements	393,000
consumers	1,694,600
	$ 3,763,668
37. The State of Oklahoma v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 5096	
$1,051,439	
institutional purchases	$ 580,000
vendor reimbursements	
consumers	473,600
	$ 1,053,600
38. The Commonwealth of Pennsylvania v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 1212	
$3,410,790	
institutional purchases	$ 940,000
vendor reimbursements	909,000
consumers	1,568,800
	$ 3,417,800
39. Commonwealth of Puerto Rico v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 806	
$1,199,834	
institutional purchases	$ 725,000
vendor reimbursements	
consumers	477,300
	$ 1,202,300
40. The State of Rhode Island v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 5112	
$424,029	
institutional purchases	$ 95,000
vendor reimbursements	156,000
consumers	173,900
	$ 424,900

41. The State of South Carolina v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 777
$1,395,831

institutional purchases	$ 910,000
vendor reimbursements	4,000
consumers	484,700
	$ 1,398,700

42. The State of South Dakota v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 205
$262,061

institutional purchases	$ 70,000
vendor reimbursements	52,000
consumers	140,600
	$ 262,600

43. The State of Tennessee v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 1631
$1,557,676

institutional purchases	$ 971,977
vendor reimbursements	45,000
consumers	543,900
	$ 1,560,877

44. The City of Memphis, Tennessee v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 1807
$289,305

institutional purchases	$ 190,000
vendor reimbursements	
consumers	99,900
	$ 289,900

45. The Metropolitan Government of Nashville and Davidson County v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 899
$146,100

institutional purchases	$ 65,000
vendor reimbursements	
consumers	81,400
	$ 146,400

46. The State of Texas v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4375
$4,640,971

institutional purchases	$ 2,700,609
vendor reimbursements	
consumers	1,949,900
	$ 4,650,509

47. The State of Vermont v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 915
$101,192

institutional purchases	$ 20,000
vendor reimbursements	
consumers	81,400
	$ 101,400

48. The Commonwealth of Virginia v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 5140
$1,412,522

institutional purchases	$ 598,825
vendor reimbursements	10,000
consumers	806,600
	$ 1,415,425

49. The State of West Virginia v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 240
State of Nevada:
$279,433

institutional purchases	$ 212,807
vendor reimbursements	8,000
consumers	59,200
	$ 280,007

State of West Virginia:
$867,648

institutional purchases	$ 338,031
vendor reimbursements	154,000
consumers	377,400
	$ 869,431

50. The State of Wisconsin v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 91
$1,940,548

institutional purchases	$ 906,936
vendor reimbursements	231,000
consumers	806,600
	$ 1,944,536

51. State of Wyoming v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 900
$343,479

institutional purchases	$ 246,585
vendor reimbursements	31,000
consumers	66,600
	$ 344,185

The figures given above for actions 8 and 24 are not quite the same as those shown in the Alabama Plan and the Election of defendants. This is due to mistakes made inadventently in the Alabama Plan.

Both the City and County of Honolulu are intervenor plaintiffs in the action (numbered 8 above) of City of Philadelphia and City of Detroit. The *County* of Honolulu was overlooked as a settling plaintiff in computing the allocations of the Alabama Plan. The County, however, has no hospital beds additional to those of the City and thus no change in the figures for institutional purchases is required. The County has no vendor reimbursement program and no change in those figures is required. But the County does have a population not included in that of the City; using the percentage formula based on the 1960 census an allocation of $44,400 was required for the consumer class in the County. This meant an addition of $44,400 to the Alabama Plan figure of $59,200 for the

Honolulu consumer class, or a total of $103,600 for this Honolulu (City and County) class. Adjusted for expenses on the basis used in the October 20, 1969 Election of defendants, this $44,400 was reduced to $44,309 and the figure for Honolulu (City and County) in the Election increased by the same amount to the $113,367 shown as now proposed in settlement.

The claim of Maybury Sanitorium (based on its hospital beds) was included in the Alabama Plan among those represented in the State of Michigan action (numbered 24 above). This turned out to be a mistake because Maybury Sanitorium, apparently located to the west of and outside the City of Detroit, is in fact operated by, and thus an institution of, the City of Detroit. The claim of Caybury Sanitorium should, therefore, be transferred from the class represented by State of Michigan (action numbered 24) to the class represented by the City of Detroit (action numbered 8). This means an increase of $5000 in the allocation in the Alabama Plan for institutional purchases in the City of Detroit action to $200,000 and a decrease of the same amount in the allocation in the Alabama Plan for institutional purchases in the State of Michigan action to $1,742,725. This $5000 represented in the Alabama Plan by the claim of the Maybury Sanitorium when adjusted for expenses on the basis used in the October 20, 1969 Election of defendants becomes $4990. This amount added to the settlement amount for City of Detroit claims and subtracted from the settlement amount for the State of Michigan claims yields the correct figures for the proposal of defendants in settlement of these claims.

The amount shown above for the State of Missouri action (numbered 27 above) as proposed to be paid by de-

fendants in respect of the claims in that action is the same as in the Election of defendants. However, the allocation amounts as between claims in this action for institutional purchases, vendor reimbursements, and consumers are not the same as in the Alabama Plan as filed. This is because, as already explained, the Alabama Plan by oversight did not make an allocation to Kansas City, Missouri, as a separate government entity plaintiff and did not reflect any reduction in the settlement amount by reason of rejection of the proposed compromise by Kansas City, Missouri. The figure in the Alabam Plan for institutional purchases in the Missouri action was $1,200,000. This has been reduced by $118,560 to $1,081,440. The $118,560 is the amount for Kansas City institutional purchases, calculated by the hospital bed formula of the Alabama Plan.

As earlier explained, the City of Santa Clara, California, is an intervenor plaintiff in the action of City of Philadelphia and City of Detroit; an order filed June 19, 1969 determined that the City of Santa Clara should not maintain a class action for consumers. The Alabama Plan contained an allocation of $75,000 to City of Santa Clara on account of claims for institutional purchases. The Election of defendants contained a similar amount for City of Santa Clara, reduced for expenses at the time of election to $74,846. It turns out, however, that the parties had confused the City of Santa Clara and the County of Santa Clara; the figure for "Santa Clara" in the Alabama Plan was calculated by use in the hospital bed formula of the hospital beds of the County; it appears that in the American Hospital Guide there are no hospital beds shown for institutions of the City of Santa Clara, and according to the formula employed there should

have been no allocation to the City of Santa Clara. Because of this mistake of fact, the parties have now eliminated any proposed payment to City of Santa Clara.

15. Hearing on the Proposed Compromise

In accordance with the several notices, the hearing on the proposed compromise began on March 24, 1970 and continued that day and the following day. No testimony was presented but both before, at, and after the hearing many affidavits, exhibits, and memoranda were submitted.

Three members of the consumer class made statements, two for the proposed settlement, and one neither for nor against.

An attorney for a consumer wished to make a statement but since it appeared that this consumer was maintaining an action and was not accepting the settlement, his attorney was not heard.

A member of the wholesaler-retailer class made a statement for the proposed settlement; another made an opposing statement.

Attorneys for many plaintiffs and for defendants were heard in support of the proposed settlement.

An attorney for six persons in Virginia, said to have been individual purchasers and members of the consumer class, was heard at some length in opposition to the proposed compromise. Aside from anything else, his position has to a considerable extent been weakened by the reversal (since the hearing) of the criminal conviction of three of defendants; he said (SM 268): "Suppose it is reversed. We are in a different ball game". It is, of course, possible that the Supreme Court will grant certiorari and reverse; what is significant at this point is the uncertainty of the outcome of the criminal proceeding.

It deserves emphasis that, except for the attorney for the six Virginians, no one at the hearing expressed any opposition to the *total* amount offered by defendants to be paid in settlement.

The only opposition was as to two aspects of the allocation.

An attorney for the City of Philadelphia and other government entities, who had been active in negotiating the settlement, ably argued that the allocation of the $97,000;000 among government entity plaintiffs as class representatives should be on the basis of population alone and not by use of any hospital bed or vendor reimbursement formulas. While making this point, the attorney urged (SM 74) that the settlement sum was "good", was "fair", and that "the overall settlement should be approved by the Court".

There was opposition by a number of attorneys for retail drug stores to the $3,000,000 allocation to the wholesaler-retailer class. They urged that $40,000,000 should be allocated to that class. They were fully heard. Attorneys for the Committee of Counsel of the wholesaler-retailer class were heard in support of the allocation, as increased by the interest on the escrow fund.

An attorney for the United States was heard in respect of an aspect of the vendor reimbursement program; his point did not involve either support of, or opposition to, the settlement.

Some messages were received from class members who did not appear at the hearing.

Two messages were received from members of the wholesaler-retailer class, one favoring and one opposing the proposed compromise.

Three consumer members wrote in opposition to the settlement, one because there was an allocation to the wholesaler-retailer class, one because administrative costs were to be paid from the settlement amount, and one because (allegedly) the administrative costs would be wasteful.

No member of any government entity institutional class wrote, either to object to the settlement or to approve it.

H. Principles for Viewing the Proposed Compromise

[1] Whether to approve the compromise involves an exercise of discretion. The Court is responsible for the protection of the many class members whose interests are involved but who do not appear in the action. Approval should be given if the settlement offered is fair, reasonable, and adequate. These terms are general and cannot be measured scientifically.

[2] the most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement. This factor is sometimes referred to as the likelihood of success. The Supreme Court directs the judge to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated;" and to "form an educated estimate of the complexity, expense, and likely duration of such litigation, * * * and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." The Supreme Court then emphasizes:

> "Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation."

The quotations are from Protective Commitee for Independent Stockholders of TMT Trailer Ferry, Inv. v. Ander-

son, 390 U.S. 414, 424-425, 88 S. Ct. 1157, 1163, 20 L. Ed. 2d 1 (1968).

Our Court of Appeals has described this factor as the "risk and cost of further litigation." Neuwirth v. Allen, 338 F. 2d 2, 3 (2d Cir. 1964).

In this connection, the judgment of counsel to plaintiffs (the class representatives) must be considered as well as the extent of support from interested parties and the presence or absence of good faith bargaining. The nature of any questions of law and issues of fact is also a factor for consideration.

The precedents in this field are collected and discussed in Haudek, The Settlement and Dismissal of Stockholders' Actions, 23 Sw. L.J. 765, 792-801 (1969).

[3] There is a further important principle to be observed in respect of judicial consideration of proposed settlements. This is that the judge does not try out or attempt to decide the merits of the controversy. "Any virtrue which may reside in a compromise is based on doing away with the effect of such a decision." In re Riggi Bros. Co., Inc., 42 F. 2d 174, 176 (2d Cir. 1930), cert. denied under name Woods & Selick, Inc. v. Todd, 282 U.S. 881, 51 S. Ct. 85, 75 L. Ed. 777 (1930). See also Schleiff v. Ches. & Ohio Ry. Co., 43 F.R.D. 175, 178-179 (S.D.N.Y. 1967) and cases there collected.

I. Conclusion: Approval of the Proposed Compromise

It has taken far longer to set out the background of this application than will be required to explain the decision.

Negotiations which led to the proposed compromise began in March 1968 and were intensive from about October 15, 1968 through about February 1, 1969. Six attorneys for government entity plaintiffs, all of whom are able and ag-

gressive antitrust law specialists, negotiated with attorneys for defendants with the same qualities. From the affidavits submitted and from the Court's knowledge of the progress of these actions, it is clear that the proposed compromise was the result of good faith bargaining at arms' length.

The situation here is unique in that the evidence *on which liability at trial would depend is in substantial part* before the Court on this application. That evidence is in the extensive record before the Sixth Circuit Court of Appeals in the Commission proceeding and in the extensive record before our Court of Appeals in the criminal proceedings.

A careful study of those records leads to a conclusion that the chances of recovery in any of these cases are no better than 50-50 and probably should more realistically be called slight. The more significant reasons for this conclusion will be mentioned.

After two exhaustive and lengthy investigations by two agencies of the government, there are no findings of any misconduct by any of the defendants which would show, even prima facie, a violation of the antitrust laws. The only findings of misconduct are those by the Commission that Pfizer and Cyanamid each in substance committed a fraud on the Patent Office; the Commission, however, found that no conspiracy in this respect between Pfizer and Cyanamid had been proved. As to the separate misconduct of Pfizer and Cyanamid before the Patent Office, our Court of Appeals has said that this is relevant to the issue of violation of the antitrust laws "only insofar as the acts of Pfizer and Cyanamid supported an inference that at the November 1953 meetings they had entered into agreements to fix prices or to exclude others."

In the Commission proceeding, the first Hearing Examiner saw and heard all the witnesses; he considered all the other evidence offered. His opinion was carefully reasoned and his conclusion was that no defendant had violated any law. The Commission did not agree but the opinion of the first Hearing Examiner remains persuasive to a degree and at least shows that the issues are doubtful. In the final result, it was found only that Pfizer and Cyanamid separately had committed fraud on the Patent Office.

Thus, in the Commission proceedings there are no findings of any misconduct by three of the defendants—Bristol, Squibb and Upjohn. As to the other two defendants, Pfizer and Cyanamid, the only finding of misconduct has to do with patent prosecutions in the Patent Office. Aside from serious questions of law about the effect of this misconduct, it would not itself constitute any violation of the antitrust laws; at best, it might arguably be some evidence of an attempt to monopolize.

The misconduct also raises a troublesome question of patent law. This is the question whether the presence of tetracycline in the broth or in the product (Aureomycin) would be sufficient to justify denial of a patent on teracycline. The inherent production of teracycline was not known before Conover and did not appear to have imparted any utility to Aureomycin. Hearing Examiner Piper concluded that tetracycline was therefore patentable, citing (among other decisions) Parke Davis & Co. v. H. K. Mulford Co., 189 F. 95 (C.C. N.Y. 1911; L. Hand, J.), affirmed 196 F. 496 (2d Cir. 1912). The Commission disagreed and Judge (then Commissioner) Higginbotham wrote ably on the subject. It is not necessary on this application to decide the question of patent law. Its significance is that it exists and that the answer is not clear.

In the criminal proceeding, the jurors required a considerable time to reach a verdict and were clearly puzzled by the Parke Davis situation. Our Court of Appeals found, among other things, that defendants were wrongly restricted in argument about the Parke Davis situation and that the Court had mistakenly charged about Parke Davis. Whether the jury would have otherwise convicted is at least doubtful. The reversal of the judgment of conviction leaves the criminal proceeding without substantial effect at this point except as it shows that the outcome of a jury trial and any appeals is highly problematical; the prima facie effect of a final judgment in a criminal proceeding (15 U.S.C. § 16) is at least postponed to a date long in the future.

The Parke Davis situation, as developed in the evidence at the criminal trial, is itself a ground for feeling that recovery by plaintiffs is not likely. The situation is, according to the opinion of the Court of Appeals, that Parke Davis was not a member of any conspiracy; that it had the second largest share of the antibiotics market; that it made some 24% of all sales (and thus sold more than four of the defendants here); that its prices were the same as those of defendants; and that its other marketing practices were the same as those of the defendants.

Not only is it uncertain that any plaintiff can secure a jury verdict. It is also uncertain whether judges or justices will find the evidence sufficient to support any such verdict.

There is no direct evidence of any price fixing or of any conspiracy. Such evidence as there is must come almost entirely from the defendants themselves and, as the Court of Appeals noted, "the facts may be said to be virtually undisputed." Before the first Hearing Examiner and at the

criminal trial, executives of defendants testified. They denied the existence of any conspiracy or any price fixing. Even if a jury chose to disbelieve such testimony, it is at least questionable whether there is other evidence sufficient to support a verdict for a plaintiff.

The Court of Appeals did not reach the issue of the sufficiency of the evidence to support the criminal conviction. As before noted, the dissenting judge found the evidence sufficient but "not overwhelming." Of course, the standard of proof in a civil action is not as high as that in a criminal proceeding.

In respect of damages, there are a number of doubtful questions both of law and of fact. There is no occasion to discuss these in any detail.

One of the questions of law, for example, is whether the Commission proceeding tolled the statute of limitations so that damages could be recovered for a 4 year period before July 1958 when that proceeding was commenced. This depends on whether the Federal Trade Commission Act is part of the "antitrust laws" as that term is used in Section 5(b) of the Clayton Act (15 U.S.C. § 16(b)). It is not within the definition of the term in the Clayton Act (15 U.S.C. § 12) and there are two decisions that Commission proceedings do not toll the statute of limitations. Laitram Corp. v. Deepsouth Packing Co., 279 F. Supp. 883 (E.D. La. 1968); Rader v. Balfour, 1969 Trade Cas. ¶ 72,709 (N.D. Ill. 1968). A contrary result was reached in Lippa's, Inc. v. Lenox, Inc., 305 F. Supp. 182 (D.Vt. 1969).

One of the questions of fact, for example, is whether, if there were any conspiracy, it "ended in July 1960," as Judge Frankel appears to have believed (Record on Appeal 5013a) or whether it continued for several years thereafter, as many of the complaints aver.

In considering the proposed compromise, it seems also to be of importance that (if approved) the substantial amounts of money are available for class members *now*, and not at some distant time in the future. The nature of these actions is such that a final judgment, assuming it to be favorable, could only be obtained after years of expensive litigation. It has been held proper "to take the bird in hand instead of a prospective flock in the bush." Ladd v. Brickley, 158 F. 2d 212, 220 (1st Cir. 1946), cert. denied 330 U.S. 819, 67 S. Ct. 675, 91 L. Ed. 1271 (1947).

The proposed compromise is supported by a very high percentage of all the plaintiffs to which it was offered. The law officers of forty-three states, Puerto Rico, anl the District of Columbia—almost all with retained specialist counsel—urge approval of the settlement. All except three of the cities ask approval; among those asking approval is the City of New York, whose counterclaim was the earliest of these claims. Nearly all of the wholesalers and retailers ask approval; these include the plaintiffs in the first action commenced for the class of retail drug stores.

[4] The strong support for the proposed compromise is a factor of great weight.

At the same time, it has to be considered that California, six other states, two counties in California, and Kansas City, Missouri, have rejected the offered settlement. These rejecting plaintiffs are represented by able and experienced counsel whose opinions about the proposed compromise must also be taken seriously into account. Even among the best lawyers, however, opinions may, and often do, differ. It is felt that in this instance a misplaced optimism about a highly problematical result has led to the exercise of questionable judgment. The rejection of the settlement occurred, of course, before the criminal convictions of three

Counsel for plaintiffs in 11 of the 13 actions support the present application, urging its approval; counsel for plaintiffs in one of the 13 actions has taken no position; and counsel for plaintiffs in one of the 13 actions have opposed as inadequate the allocation to this class.

Attorneys from the Commitee of Counsel for the wholesaler-retailer class argued at the hearing in support of the settlement. Two attorneys for plaintiffs in one of the 13 consolidated wholesaler-retailer actions argued against the allocation proposed for the wholesaler-retailer class, as did two attorneys for certain members of the class; one attorney for some members of this class said at the hearing: "* * * we are not completely or * * * not opposed to this plan as such, but we are not necessarily in favor of it either" (SM 181).

As earlier explained, representatives of the wholesaler-retailer class unanimously proposed an allocation of $40,000,000 to that class. Insistence on that figure would almost certainly have destroyed any chance of settlement. Nearly all members of the Committee of Counsel for the class accepted a compromise, under which (in substance) defendants, for the benefit of the wholesaler-retailer class, paid the settlement amount into escrow, before they could have been required to make any payment.

The few opposing members of the wholesaler-retailer class are critical of many of the procedural steps taken by the Court. Their criticisms need not be examined in detail. They all concern the orientation of the procedure toward settlement administration rather than toward discovery, decision of law points, and the like. This orientation was deliberately chosen in order to determine which class members wished to settle and which class members wished to litigate. All members were

given an option to exclude themselves from their class. It was also recognized that in class actions, orders "may be altered or amended as may be desirable from time to time" (Fed. R. Civ. P. 23(d)).

The only argument of *any possible substance* for the opposing members of this class is that the damage to the class is easily provable and, as a matter of law, cannot be denied by defendants.

Without attempting to decide the matter, it appears at first glance to be highly doubtful whether wholesalers or retailers suffered any damage whatever. Defendants sold only in dosage form; this means that the wholesaler then sold in the original packages (at a mark-up of 16 2/3% or more over cost) and that—if the retail druggist did not always sell in the original packages but repackaged in varying quantities—at least the retail druggist sold the dosage form just as received from a wholesaler or from a defendant and without any addition, subtraction or combination. To the consumer, antibiotics are sold only by prescription. In some instances the retail druggist may charge his cost, plus a flat professional fee. According to affidavits of experts in the field, however, the overwhelming majority of drug stores in the period 1953-66 charged for prescription drugs a uniform mark-up of 66 2/3% over cost. If so, this would mean that any overcharge by defendants in violation of the antitrust laws was passed on to the end use purchaser. The result is that wholesalers and retailers, far from sustaining damages, made substantial profits from any antitrust violations.

It is suggested that the wholesalers and retailers lost sales because of the alleged high prices and that thus they suffered damage. No decision can be made on this record

of the defendants had been reversed by the Court of Appeals. It must also be recognized that ultimately a larger recovery may possibly be obtained by the rejecting plaintiffs than the amount presently available in settlement. However, the chances of this occurring do not seem to be very great.

It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced. Merely by way of example, two instances in this Court may be cited where offers of settlement were rejected by some plaintiffs and were disapproved by this Court. The trial in each case then resulted unfavorably for plaintiffs; in one case they recovered nothing and in the other they recovered less than the amount which had been offered in settlement.

In Piccard v. Sperry Corp., 36 F. Supp. 1006 (S.D.N.Y.), affirmed 120 F. 2d 328 (2d Cir. 1941), a proposed settlement was disapproved. The action was then tried on the merits, resulting in judgment for defendants (48 F. Supp. 465 (S.D.N.Y. 1943), affirmed 152 F. 2d 462 (2d Cir.), denied 328 U.S. 845, 66 S. Ct. 1024, 90 L. Ed. 1619 (1946)).

In Upson v. Otis, 155 F. 2d 606 (2d Cir. 1946), approval of a settlement was reversed, the Court saying (at 612); "on the facts presented to the district judge, the liability of the individual defendants was indubitable and the amount of recovery beyond doubt greater than that offered in the settlement." The action was then tried and plaintiffs obtained a judgment, twice considered by the Court of Appeals (168 F. 2d 649, 169 F. 2d 148 (1948)). We are told, however, that "the ultimate recovery * * * turned out to be substantially less than the amount of the rejected compromise." Haudek, The Settlement and Dismissal of Stockholders' Actions, 23 Sw. L.J. 765, 794 (1969).

[5] It is concluded that for many good reasons the proposed compromise should be approved. This approval extends to the allocation of dollar amounts as between the several actions (reflected in the Election of defendants and set out above) and also to the allocation of dollar amounts in each of the government entity actions as between institutional purchases, vendor reimbursements, and consumers (as reflected in the Alabama Plan and set out above).

The point made by the attorney for City of Philadelphia and others, that division should be on the basis of population, has been carefully considered. Such a method may well be reasonable. But the method employed in the Alabama Plan is also reasonable and it also makes use of objective data from independent, neutral sources. There is no sufficient reason for rejecting the method of division in the Alabama Plan, in the light of the widespread support which it commands.

Specific mention should be made of several matters.

1. Allocation to the Wholesaler-Retailer Class

As shown above, the proposed compromise includes for claims of members of the wholesaler-retailer class the sum of $3,013,939 plus the interest on the escrow fund to November 23 or December 23, 1970.

This allocation, as well as the rest of the proposed compromise, is strongly supported by nearly all the representatives of the wholesaler-retailer class. As before explained, for purposes of administering the settlement all actions on behalf of this class in which the plaintiffs had accepted the settlement were consolidated by the May 26, 1969 order. There were 13 such actions. All counsel of record for any parties plaintiff in these actions were constituted a Committee of Counsel.

whether in fact the suggestion is true or not. There is persuasive evidence in the Commission proceeding and at the criminal trial that the suggestion is not true. The reason is that doctors prescribe antibiotics and doctors look to the health of the patient rather than to the price of the needed drug.

The representatives of the wholesaler-retailer class, both those in favor of and those opposed to the present proposed allocation, contend that as a matter of law their class members may recover for any illegal overcharges by defendants whether or not these were collected from the end use consumers. They rely on Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968). Their reliance might after long litigation prove to be well placed. For present purposes, no decision is required but it is very doubtful, to say the least, that *Hanover* would apply to the situation here; the point must be regarded as highly uncertain.

United charged Hanover more for shoe machinery than would have been charged except for the antitrust law violation. The machinery was then used in making shoes from Hanover designs, using all the necessary materials (leather, thread, cloth, etc.) and applying the labor and skills of the Hanover organization. The use of the machinery was by Hanover, which was in the position of a consumer or end user of the machinery. The machinery was not resold, as were the antibiotics in suit. The illegal overcharge in *Hanover* was merely one of many items of cost; as the Court said, it "was *reflected* in the price charged for shoes sold by Hanover to its customers" (392 U.S. at 488, 88 S. Ct. at 2228, emphasis supplied). Here the antibiotics in dosage forms (capsules, tablets, or other forms) were resold just as obtained from defendants. Nothing was added

or changed. The mark-up was applied to the cost and the resultant price was collected from the consumer. The higher the cost, the higher the mark-up, and the higher the profit to the members of this class. The situation here seems much like the "'cost-plus' contract" referred to in the *Hanover* opinion; the Supreme Court recognized that in such a case it was easier to prove that there were no damages and that the "passing-on defense" might therefore be valid (392 U.S. at 494, 88 S. Ct. 2224).

Whatever the correct answer to this riddle may be, it is difficult to see in these cases any real damage to wholesalers or retailers.

The attitude of the members of the wholesaler-retailer class indicates no real damage to them.

Notices were sent to some 55,000 members of the wholesaler-retailer class. Claims were filed by about 4100 members (of which about 70 were wholesalers). This seems a surprisingly small percentage of claimants to a sum of money known to be available in settlement. At the same time, about 1500 members excluded themselves from the class. We are told by those opposed to the present ollocation that "'some 1,500 claim forms [were] returned with statements by druggists that they were not damage[d] and therefore wished to make no claim." Several such statements by druggists were read into the record (SM 371-374). Typical is this statment from a druggist in Wisconsin (SM 372):

> "Any pharmacy claiming damages is, in my opinion, guilty of lying. All pharmacies base their retail prices for drugs on their costs, either using a fixed percentage or a professional fee. Either way, they do not suffer damages due to higher wholesale costs of these drugs. If anyone has a complaint, it would be the individual consumer, not the pharmacists."

The Court in *Hanover* also alluded to the danger to the private enforcement of the antitrust laws if a "passing-on defense" were permitted and recovery allowed only to those who had ultimatly paid th higher prices generated by an antitrust violation: "These ultimate consumers * * * would have only a tiny stake in a lawsuit and little interest in attemping a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them." 392 U.S. at 494, 88 S. Ct. at 2232. Here, in contrast to the situation in *Hanover*, that danger does not exist, for it is proposed that much of the settlement amount be made available to ultimate purchasers (institutions or individuals) who are before the Court as plaintiffs and class members and who have sustained the burden of the alleged overcharge. Contrast also State of Minnesota v. United States Steel Corp., 299 F. Supp. 596 (D. Minn. 1969), appeal docketed, No. 20184 (8th Cir. March 5, 1970).

[6] The only possible conclusion is that the allocation proposed for the wholesaler-retailer class is fair and reasonable. It is a matter of real concern that the allocation is too high. The situation is, however, that the excess above $3,013,939 (which excess may well be $8,000,00 or more) is a further contribution to this class by *defendants* and thus does not reduce the amounts for other classes. If defendants by this means choose to make a settlement possible, the Court should encourage the effort rather than defeat it.

2. The Vendor Reimbursement Claims; Position of the United States

As described before, states, counties and cities under public assistance programs often reimbursed vendors for

antibiotics delivered to those receiving such assistance. About 50% of the cost of these programs was paid by the federal government under the Social Security Act (42 U.S.C. § 301 and following).

An attorney representing the United States made a statement at the hearing and has submitted papers afterward. It appears that in a separate action by the United States, not among these 66 settling actions, there are claims against defendants based on contributions of the federal government to public assistance programs of states which made reimbursement to vendors for antibiotics.

The defendants contend now, and will contend in the action of the United States, that the present settlemen, if consummated, puts to rest all claims by settling government entities, whether the source of the funds employed for antibiotics purchases was the federal government or otherwise. Defendants also contend that the United States has no claim on account of vendor reimbursement under public assistance programs but that the settling government entities are the proper parties to assert any such claim. It is stipulated by defendants and the settling government entities that their intent was to settle all claims from welfare payments "irrespective of reimbursemnt by any other entity."

The United States takes the position that it has a "separate and independent claim" which "will not be compromised by a judgment in this action" (Hearing, March 25, 1970, SM 298).

All parties, including the United States, agree that it is not necessary at this time to decide what effect this settlement will have on the claim of the United States. It is enough to note that approval of the proposed compromise

indicates no opinion whether the United States has or ever had a claim or, if so, whether the compromise extinguishes such claim.

3. City of Santa Clara and Black Horse Pike Regional School District

In the action of City of Philadelphia and City of Detroit (numbered 8 above) the City of Santa Clara is an intervenor plaintiff and so also is the Board of Education of the Black Horse Pike Regional School District (N.J.) Nothing is proposed to be paid in settlement to these two intervenor plaintiffs and therefore, they can (if they so desire) continue to prosecute their claims in the action; this action as to them will not on the present record be dismissed.

4. Costs of the Settlement Proceeding

It is part of the proposed compromise that "costs incurred in proceedings" of the settlement, including "administrative costs" shall be paid from the settlement amounts (para VI of the settlement plan). This means that any such "costs" advanced by defendants, to the extent approved by the Court, are to be deducted from the settlement amounts. An affidavit submitted by defendants (Wood affidavit, para 18) gives many of these items. When orders are submitted on this decision, defendants should submit in affidavit form a complete list of all moneys advanced by them at any time for "costs" so that the Court can determine a final figure to be deducted on this account from the settlement amounts.

5. "Ampicillin"; Agricultural Claims

Mention was made at the hearing on March 24, 1970 (SM 30-34) of a drug "ampicillin" and of some civil ac-

tion by the United States with respect to that drug. Except for this mention on March 24, 1970, there is nothing in the record about any such drug. It is impossible, therefore, to say at this time what effect, if any, the consummation of the proposed compromise would have on claims of these plaintiffs, if any, on account of "ampicillin."

Attorneys representing plaintiffs in actions asserting claims on account of purchases of antibiotics for agricultural uses have addressed a request to the Court. This is that it be made clear in the order of approval that the agricultural claims are not affected by this settlement. It is impossible to say at this time what effect, if any, the consummation of the proposed compromise would have on claims on account of purchases of antibiotics for agricultural uses.

6. Determination and Direction Under Fed. R. Civ. P. 54(b)

Since the proposed compromise is being approved, the defendants are entitled to an order in each of these actions directing judgment in their favor dismissing the action as to them (except in action numbered 8 as to intervenor plaintiffs City of Santa Clara and Board of Education etc.). While such a judgment will be final as to them, the action will not be terminated because the Court must reserve jurisdiction amongst the class representatives and class members and, in this connection, deciding all issues which arise between claimants. Defendants have no concern with these matters and should not be required to involve themselves therein. It is, however, important for the administration of justice that each order approving the proposed compromise and each judgment dismissing an action as against defendants be final before any attempt is made to distribute the settlement amounts. Any appeal from the approval of the proposed compromise should be taken now.

[7] It seems, therefore, more prudent to include in each order an express determination that there is no just reason for delay and an express direction for the entry of judgment in favor of defendants dismissing the action as to them. Fed. R. Civ. P. 54(b); Republic of China v. American Express Co., 190 F. 2d 334 (2d Cir. 1951), 195 F. 2d 230 (2d Cir. 1952). But see Barnes v. Osofsky, 373 F. 2d 269 (2d Cir. 1967).

The proposed compromise is approved.

Settle order in each of these actions.

APPENDIX II

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 53-597—September Term, 1970.

(Argued March 16, 1971 Decided March 29, 1971.)

Docket Nos. 35700-35784

STATE OF WEST VIRGINIA,

Plaintiff-Appellee,

v.

CHAS. PFIZER & CO., INC., *et al.*,

Defendants-Appellees.

ALPINE PHARMACY, INC., *et al.*,

Plaintiffs-Appellees,

—v.—

CHAS. PFIZER & CO., INC., *et al.*,

Defendants-Appellees.

COTLER DRUGS, INC., *et al.*,

Plaintiffs-Appellants,

and

LOUIS PATLOGAN, formerly doing business as PATLOGAN'S WESTERN PHARMACY,

Petitioner-Appellant.

Before:

MOORE and SMITH, *Circuit Judges,*
and TIMBERS,* *District Judge.*

Appeal from order of the United States District Court for the Southern District of New York, Inzer B. Wyatt, *Judge,* entering final judgment in favor of defendants-appellees and dismissing actions as to them. Affirmed.

SMITH, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Southern District of New York, Inzer B. Wyatt, *Judge,* dated September 29, 1970 entering final judgment in favor of defendants-appellees and dismissing the actions as to them. The opinion is reported at 314 F. Supp. 710.

This case involves some 66 civil actions, 26 of which were commenced in the Southern District of New York and 40 of which were transferred to that district by the Judicial Panel on Multidistrict Litigation "for coordinated or consolidated pre-trial proceedings." The claim in each of these actions is that the defendants, who manufacture certain broad spectrum antibiotic drugs, are guilty of violations of the antitrust laws in the sale of these antibiotics, specifically sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2). Treble damages were sought, as authorized in 15 U.S.C. § 15.

Before these actions proceeded to trial the defendants, on February 6, 1969 (as modified on May 9, 1969), proposed an offer of settlement in the amount of $100,000,000 as to the claims of the following groups:

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(1) States, counties, cities and their political subdivisions and agencies and any other governmental entities (excluding the Federal Government) arising out of their direct purchases or out of payments to or for the benefit of recipients of welfare or other aid; and

(2) Wholesalers, retailers, and individual consumers arising out of their purchases, including claims of the states as *parens patriae* on behalf of their citizens or on behalf of classes including the state as a consumer and all other consumers in the state.

The terms of this settlement offer were as follows:

(1) The appropriate actions would be determined to be maintained as class actions pursuant to Rule 23 of the Federal Rules of Civil Procedure and the appropriate notices with option to be excluded from the class would be directed to all class members;

(2) If the exclusions were "substantial" and "material" the defendants could withdraw the offer;

(3) The $100 million settlement figure would be reduced appropriately to reflect the exclusions from class membership;

(4) Any plaintiff accepting the settlement could present to the Court a proposed plan for the allocation of the amount received within each class;

(5) If all the plaintiffs did not agree on a common plan, then the defendants could elect to proceed with any proposed plan;

(6) The plan either agreed to or selected by the defendant would be submitted to the District Court

for approval pursuant to Rule 23(e) of the Federal Rules of Civil Procedure.

(7) The administrative and other costs of the litigation would be paid from the settlement fund; and

(8) If the settlement were approved, all claims covered within its terms would be "satisfied or otherwise terminated."

On May 26, 1969, after the settlement had been accepted in principle by nearly all the plaintiffs, the district court issued an order containing the following provisions:

(1) The several states, Puerto Rico, and the District of Columbia were designated as a "temporary national class" from which any of these plaintiffs not accepting the offer of settlement could by notice exclude themselves. As to those states accepting the offer of settlement, each action commenced by them was to be maintained as a class action as to two classes: (a) claims of states, counties, cities and their political subdivisions and agencies arising out of their purchases or out of payments to or for the benefit of recipients of welfare or other aid; and (b) individual members of the consuming public who bought antibiotics in the state.

(2) City and county government entities which as plaintiff or intervenor plaintiff had pleaded by June 10, 1969 a class claim on behalf of consumers resident within their territorial limits could maintain a class action as proper representatives of the class.

(3) Actions commenced by wholesale drug stores which had accepted the offer of settlement were consolidated into the "consolidated wholesaler-retailer

class" whose members were specified to be all purchasers of broad spectrum antibiotics who bought for "resale at wholesale or retail."

Having determined that certain actions were to be maintained as class actions, the district court pursuant to Rule 23(c)(3) in an order dated June 16, 1969 directed that notice be given to the various classes in the following manner.

(1) As to government entities and institutions, notice was to be by first class mail, the mailing list of class members to be supplied by the parties, usually the class representatives. This notice described the situation generally and included a copy of the settlement plan. The class members were given until August 1, 1969 to exclude themselves from the class.

(2) As to the consumer class members, notice was to be given by publication of the prescribed form on or about July 1, 1969 in every daily English aid Spanish language newspaper of general circulation in each state. The consumer class members were given until August 1, 1969 to exclude themselves from the class, and they were also notified that if they wished to make a claim in the settlement they were required to file by August 16, 1969 a verified statement or a statement certified by their supplier. The notice to consumers also contained the following statement: "If you do not make an individual claim by August 16, 1969 that will constitute an authorization to the Attorney General [or other government official] to utilize whatever money he may recover as your representative for the benefit of the citizens of your State in such manner as the Court may direct."

(3) As to the consolidated wholesaler-retailer class, notice was to be given by first class mail, the mailing list of class members to be supplied by Clark-O'Neill, Inc., a business engaged in maintaining a mailing list of wholesale drug houses and retail drug stores in the United States. The wholesaler-retailer class members were given until August 1, 1969 to file an individual claim or to exclude themselves from the class.

Notices of exclusion were timely filed by 61 members of the classes consisting of government entities and institutions, 42 members of the class consisting of individual purchasers, and by about 1500 members of the class consisting of wholesalers-retailers. Claims amounting to $16,500,000 were filed by 38,000 members of the class consisting of individual purchasers, and 4100 wholesalers and retailers filed claims. The face amount of the purchases made by these claimants was in excess of $345,000,000.

Thereafter, in accordance with the terms of the settlement, several plaintiffs submitted separate plans for the allocation of the $100 million settlement fund. The most detailed and comprehensive of these, the so-called "Alabama Plan," was, with some modifications, the one accepted by the defendants and approved by the court. The theory behind this plant was that the claims of the government entities were entitled to first priority, since the dollar amount of their purchases and payments could be calculated with reasonable accuracy and the damages were direct and provable. The dollar amount of these sales and payments was determined to have been $121,620,000, and it was also calculated that the prices actually charged contained an overcharge of 66⅔%. Al-

lowing for uncertainties in law and in fact, it was concluded that for settlement purposes an overcharge figure of 40-41% could properly be used. Applying 41% to the sales figure yielded a figure of $49,864,200 or, rounded off, $50,000,000. On the same basis it was calculated that the appropriate settlement figure for reimbursement payments to welfare recipients by the government entities was $10,000,000. This left $40 million to be divided between claims of wholesalers and retailers on the one hand and individual consumers on the other.

As to the claims of the wholesalers and retailers, many of the plaintiffs were of the view that these purchasers were not entitled to any reimbursement because the members of this class sold nearly all their antibiotics to consumers on the basis of cost plus a fixed percentage profit, which resulted in their actually making higher profits as a result of the antitrust violations. However, in order to secure the agreement of the wholesaler-retailer class to the settlement, a "nuisance value" allocation of $3 million was made to the members of this class. This is one of the disputes raised in this appeal and is dealt with below.

Finally, as to the remaining $37 million allocated for individual consumers, individual claims of $16.5 million had been filed by some 38,000 persons. After these were settled, the remaining amount would be retained by the states as indicated in the public notice to be disbursed in accordance with the direction of the district court. This is the other major issue raised in this appeal and is also discussed below.

The plan then undertook to allocate the $50 million given to governmental institutions on the basis of the number of hospital beds in the institutions of, or represented by each plaintiff as a percentage of the total num-

ber of hospital beds in the country. As to the $10 million vendor reimbursement fund, allocation was made on the basis of each state's welfare payment program. The $37 million which had been allocated to the claims of individual purchasers was divided into the amount applicable to each class of consumers represented by each government entity plaintiff on the basis of the percentage of the total population represented by the population of each government entity plaintiff.

Finally, the total amount was adjusted downward to $82,615,030 to allow for those plaintiffs who had elected to exclude themselves, except that no adjustment was made for wholesaler-retailers or for the consumer class members who had elected to be excluded.

The only serious objections to this plan were raised by some members of the wholesaler-retailer class who contended that they were entitled to the entire $37 million going to consumers. After extensive negotiations, it was agreed that defendants would deposit the settlement immediately in an escrow account, and the interest on this account, amounting to more than $8 million, would accrue to the wholesaler-retailer class. Nearly all of the committee of counsel for the wholesaler-retailers accepted this arrangement. On October 20, 1969 a plan was filed in accordance with these terms for the approval of the court, and the funds were deposited in an escrow account. The escrow agreement provided (in part):

> (b) if there is a final order approving the proposed compromise by November 23, 1970, then on that date the escrow fund shall be divided into two separate such funds, one of $82,327,276 for classes represented by government entity plaintiffs and the other of the balance of the escrow fund for the wholesaler-retailer class;

(c) if there is no final order by November 23, 1970, then the division into two separate funds will take place on December 23, 1970. The effect is thus to give the wholesaler-retailer class the benefit of an additional month's interest on the entire escrow fund;

In orders dated February 4 and 6, 1969 the Clerk of the Court was directed to give notice directly and by publication to all parties in the same manner as was prescribed in the order of June 16, 1969, *supra*, as to a hearing on the proposed settlement to be held on March 24, 1970. In the meantime other minor adjustments not relevant to the issues raised on this appeal were made to the total amounts going to the various classes [see, 314 F. Supp. 732-739].

At this hearing again the only serious objections raised to the settlement plan came from some of the members of the wholesaler-retailer class to the effect that they were entitled to the entire $37 million. It should be emphasized that only a minority of this class continued to raise these objections. On June 24, 1970 Judge Wyatt filed a lengthy opinion and order approving the settlement and dismissing the actions against defendants. This appeal followed by the minority members of the wholesaler-retailer class.

The first question to be considered is what is the proper scope of review for this court to apply. Judge Wyatt viewed his responsibilities in evaluating the settlement as follows:

> Whether to approve the compromise involves an exercise of discretion. The Court is responsible for the protection of the many class members whose in-

terests are involved but who do not appear in the action. Approval should be given if the settlement offered is fair, reasonable, and adequate. These terms are general and cannot be measured scientifically.

The most important factor is the strength of the case for the plaintiffs on the merits, balanced against the amount offered in settlement. This factor is sometimes referred to as the likelihood of success. The Supreme Court directs the judge to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated" and to "form an educated estimate of the complexity, expense, and likely duration of such litigation . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." The Supreme Court then emphasizes: "Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation." The quotations are from *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U.S. 414, 424-425 (1968) [314 F. Supp. at 740-741].

It appears to be well settled that in reviewing the appropriateness of the settlement approval, the appellate court should only intervene upon a clear showing that the trial court was guilty of an abuse of discretion.[1] As Judge Brown in the Fifth Circuit recently noted in *Florida Trailer and Equipment Co.* v. *Deal*, 284 F. 2d 567, 571 (1960):

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1. *Conn. Ry. and Lighting Co.* v. *New York, N. H. & H. R.R.*, 190 F. 2d 305, 308 (2d Cir. 1951); *In re Prudence Inc.*, 98 F. 2d 559 (2d Cir. 1938). (See, 3B Moore 23.80(4); *Norman* v. *McKee*, 290 F. Supp. 29 (N.D. Cal. 1968).)

> Of course, the approval of a proposed settlement does not depend on establishing as a matter of legal certainty that the subject claim or counterclaim is or is not worthless or valuable. The probable outcome in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation. But the very uncertainties of outcome in litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. Parties would be hesitant to explore the likelihood of settlement apprehensive as they would then be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and thus no basis for a compromise.

It is important to take particular note of the fact that in reviewing the compromise, this court need not and should not reach any dispositive conclusions on the admittedly unsettled legal issues which the case raises, yet at the same time we are apparently required to attempt to arrive at some evaluation of the points of law on which the settlement is based. A number of years ago this court set forth the applicable standard in *In Re Prudence* (*supra n.* 1):

> The district court did not determine the validity of the government's claim with respect to the taxability of the "commissions"; nor need this Court do so. The very purpose of a compromise is to avoid the determination of sharply contested and dubious issues, as

> this Court pointed out in *In Re Riggi Brothers*, 42 F. 2d 174, 176. Hence, to succeed upon this appeal the appellant must show, assuming there are no issues of fact in dispute, that the rules of law for which she is contending are so clearly correct that it was an abuse of discretion for the district court to approve the settlement [98 F. 2d at 560].

The most interesting and difficult issue which this appeal presents is the use of the "passing-on" doctrine as regards the claims of the wholesalers and retailers, not as a defense to escape liability, as is normally the case, but rather as a basis for determining the distribution of the damages recovered among various plaintiffs. Judge Wyatt had the following comments on this question:

> Without attempting to decide the matter, it appears at first glance to be highly doubtful whetehr wholesalers or retailers suffered any damage whatever. Defendants sold only in dosage form; this means that the wholesaler then sold in the original packages (at a mark-up of 16⅔% or more over cost) and that if the retail druggist did not always sell in the original packages but repackaged in varying quantities—at least the retail druggist sold the dosage form just as received from a wholesaler or from a defendant without any addition, subtraction, or combination. To the consumer, antibiotics are sold only by subscription. In some instances the retail druggist may charge his cost, plus a flat professional fee. According to affidavits of experts in the field, the overwhelming majority of drug stores in the period 1953-1966 charged a uniform mark-up of 66⅔% over cost. If so, this would mean that any overcharge by defendants in violation of the anti-

> trust laws was passed on to the end use purchaser. The result is that wholesalers and retailers, far from sustaining damages, made substantial profits from any antitrust violations [314 F. Supp. at 710].

Although appellants dispute the factual accuracy of the court's finding that they suffered no economic loss, they also contend that even accepting this premise, they are still entitled to recovery under *Hanover Shoe* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968). In that case United had charged Hanover more for shoe machinery equipment than would have been charged but for the violation of the antitrust laws. The cost of the machinery was one of several factors which went into the price at which Hanover sold its products to the consumer. In these circumstances, the Court relying on its prior decisions in *Chattanooga Foundry and Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906); *Thomsen* v. *Caysen*, 243 U.S. 66 (1917); *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918); and *Adams* v. *Mills*, 286 U.S. 397 (1932) held that the passing-on *defense* was not available to United. Mr. Justice White noted:

> We are not impressed with the argument that sound laws of economics require recognizing this defense. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed, a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypo-

thetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. . . . . Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. On the other hand, it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories. . . .

Our conclusion is that Hanover proved injury and the amount of its damages for the purposes of its treble-damage suit when it proved that United had overcharged it during the damage period and showed the amount of the overcharge; United was not entitled to assert a passing-on defense. We recognize that there might be situations—for example, when an overcharged buyer has a pre-existing "cost-plus" contract, thus making it easy to prove that he had not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present. 392 U.S. at 492-494.

In considering the question of whether the obvious reluctance of the Court to allow the passing-on doctrine to be used as a defense to treble-damage liability should dictate the result in the context of the present case, the most important thing to keep in mind is the result orientation with which the Court has approached the whole area of private treble-damage litigation. A good example

of this is contained in *Minnesota Mining and Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965). There the question was whether the statute of limitations was tolled under section 5(b) of the Clayton Act by an FTC proceeding, as distinguished from an anti-trust proceeding instituted by the Department of Justice. In spite of Mr. Justice Black's persuasive dissent on the legislative history of the statutes, the Court held the statute was tolled, while obliquely admitting that the result was difficult and perhaps impossible to justify in terms of conventional analysis of the text and legislative history, precisely because a "contrary conclusion" would "deprive large numbers of private litigants" of assistance in their treble damage litigation [381 U.S. at 322]. In *Perma Life Mufflers Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), the Court noted that it has granted certiorari "because those rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the anti-trust policy of the United States" [392 U.S. at 136]. The Court in *Perma Life* then went on to substantially narrow the *pari delicto* doctrine as a defense noting:

> The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. 329 U.S. at 139.

In *Hanover Shoe* itself Justice White placed strong emphasis on the Court's desire to encourage private treble damage actions.

> These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit, and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price-fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness [392 U.S. at 494].

Keeping these comments in mind, there are then several obvious distinctions between the principles laid down in *Hanover Shoe* and the present case. First, the passing-on doctrine is not here being used as a defense to permit the defendants to escape liability, but rather as an attempt to award damages, insofar as is possible, to those who ultimately paid higher prices as a result of the collusive pricing, and to avoid giving a windfall gain to those who rather clearly were not injured. Secondly, to permit the use of the doctrine in the present circumstances will not act to limit or frustrate private treble-damage claims, but will, if anything, do the opposite. As Judge Feinberg noted in discussing this problem in *Atlantic City Electric Co.* v. *General Electric Co.*, 226 F. Supp. 59, 70 (S.D.N.Y. 1964):

> Were consumers a proper party in these proceedings, it might be urged by defendants that the Court should equitably distribute the damages between the utilities and the consumers, but when the only parties to the suit are the equipment manufacturers and the immediate purchaser-utilities, the manufacturers should not be able to prevent the utilities from recovering from them the amount of the overcharges because the utilities have passed them on to the ultimate consumers in the form of higher rates.

Finally, the *Hanover Shoe* Court itself indicated, as quoted above, that it might well be willing to recognize, in the limited situation where the initial purchaser of the collusively priced goods resold them on a "cost-plus" basis "thus making it easy to prove that he had not been damaged . . . [that] the considerations requiring that the passing-on defense not be permitted in this case would not be present" [392 U.S. at 494]. The record below makes it clear that the arrangements under which the wholesalers and retailers resold these products were, in virtually all cases, cost plus a set percentage markup (for wholesalers 16-2/3%, for retailers 66-2/3%). Judge Wyatt therefore concluded:

> Here the antibiotics in dosage form (capsules, tablets, or other forms) were resold just as obtained from defendants. Nothing was added or changed. The markup was applied to the cost and the resultant price was collected from the consumer. The higher the cost, the higher the profit to the members of this [wholesaler-retailer] class. The situation here seems much like the "cost-plus" contract referred to in the *Hanover* opinion . . . [314 F. Supp. at 746].

In regard to this point, therefore, we conclude that the district court was well within its discretion.[2]

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2. See the "oil jobber" cases—*Clark Oil Co.* v. *Phillips Petroleum Co.*, 148 F. 2d 580 (8 Cir.), *cert. denied*, 326 U.S. 734 (1945); *Northwestern Oil Co.* v. *Socony Vacuum Co.*, 138 F. 2d 967 (7 Cir. 1943), *cert. denied*, 321 U.S. 792 (1945); *Twin Parts Oil Co.* v. *Pure Oil Co.*, 119 F. 2d 747 (8 Cir.), *cert. denied*, 314 U.S. 644, *rehearing denied*, 314 U.S. 711 (1947); *Leonard* v. *Socony Vacuum Oil Co.*, 42 F. Supp. 369 (W.D. Wisc. 1942), *appeal dismissed*, 130 F. 2d 535 (7 Cir. 1942).

The second major contention of the appellants concerns the propriety of permitting the states to recover through their attorneys general damages on behalf of individual consumers who have not themselves filed any claims. Initially the recovery by the state on behalf of consumers was based on two alternative theories, that of the state acting as *parens patriae*, and secondly, that of a standard Rule 23 class action. *Parens patriae*, literally "parent of the country," refers traditionally to the role of the state as sovereign and guardian of persons under a legal disability to act for themselves such as juveniles, the insane, or the unknown. Recently the doctrine has been used to allow the state to recover damages to quasi-sovereign interests wholly apart from recoverable injuries to individuals residing with the state. These quasi-sovereign interests have included the "health, comfort, and welfare" of the people, interstate water rights, pollution-free interstate waters, protection of the air from interstate pollutants, and the general economy of the state. [See Simburg, "State Protection of Economy and Environment," 6 COLUM. J. OF LAW AND SOC. PROB. 411 (1970).]

The use of the *parens patriae* theory has not, however, met with much success in the few attempts to apply it to the recovery of treble-damage antitrust claims, most notably in the recent ruling of the Ninth Circuit in *State of Hawaii* v. *Standard Oil Co.*, 431 F. 2d 1282 (1970), reversing the District Court for Hawaii which had allowed a private antitrust action to be brought by the state under this theory, although the Supreme Court has recently granted certiorari in this case, 39 U.S.L.W. 3367 (March 1, 1971).[3] While in our view the court below might well

3. See also, *Philadelphia Housing Authority* v. *American Standard*, 309 F. Supp. 1057 (E.D. Pa. 1969); *Pfizer and Co., Inc.* v. *Clark County Hospital Ass'n*, 69 Civ. 768

have considered making use of a *parens patriae* theory in the present case (see, "State Protection of Its Economy and Environment" (*supra*)), Judge Wyatt made it quite clear, in spite of the assertions of appellants here, that new as proceeding solely on the basis of a Rule 23 class action, and therefore evaluation of the *parens patriae* doctrine by this court is unnecessary.

We then turn to the question of the propriety of permitting the maintenance of a class action under Rule 23. To be maintainable as a class action, a suit must meet all the requirements set forth in Rule 23(a) and also fall within one of the subsections of 23(b), in this case 23 (b)(3).[4]

(S.D.N.Y. 1970); *North Carolina v. Chas. Pfizer and Co.*, 69 Civ. 839 (S.D.N.Y. 1970).

4. Rule 23(a). *Prerequisites to Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Section 23(b). *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * * * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest

In *Eisen* v. *Carlisle and Jacquelin*, 391 F. 2d 555 (2d Cir. 1968) this court had before it the question of whether a class action was proper by a single "odd-lot" purchaser of securities on behalf of himself and an estimated 3,750,000 other odd-lot traders in an action alleging violations of the Sherman Act. Judge Medina in a lengthy opinion held that a class action under these circumstances was maintainable under the provisions of revised Rule 23(b)(3), and the holding in *Eisen* would appear largely controlling in the present case. Rather clearly the requirements of Rule 23(a) have been met in that joinder of all the members would be impossible, questions of law and fact as well as claims and defenses are typical of all the members, and the representation by the state adequately protects the class members' interests.

Obviously the only practical way that individual consumers could recover in the circumstances of this case is through the device of class representation, and, as Judge Medina noted, "the class suit [is designed to] provide small claimants with a method of obtaining redress for claims which would otherwise bee too small to warrant individual litigation." [391 F. 2d at 560.] In addition, as Judge Medina pointed out, under both the old and new versions of Rule 23, antitrust violations involving large numbers of individuals have been held to merit treatment as class actions.[5]

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of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

The appellants also attack the adequacy of the notice given to consumers pursuant to Rule 23(c)(2). This section calls for "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." As noted above, notice to consumers was published in quarter-page, prominently headlined ads in every daily newspaper in the participating states. There are no precise rules as to what constitutes adequate notice, and the due process standards have been held to vary depending on the circumstances of each case. In the present action notice by publication was obviously the only practical alternative. The Supreme Court in *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 317 (1949) noted: "This Court has not hestitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning." Judge Weinstein in *Dolgow* v. *Anderson*, 43 F.R.D. 472, 497, 498 (E.D.N.Y. 1968) commented on the particular notice problem involved here.

> In determining what constitutes "the best notice practicable under the circumstances," it is necessary to

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5. *Kainz* v. *Anheuser Busch Inc.*, 194 F. 2d 737 (7 Cir.) *cert. denied*, 344 U.S. 820 (1952); *City of Philadelphia* v. *Morton Salt Co.*, 248 F. Supp. 506 (E.D. Pa. 1965); *Seigel* v. *Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967); *Philadelphia Electric Co.* v. *Anaconda Brass Co.*, 43 F.R.D. 452 (E.D. Pa. 1968); cf. *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920 (2d Cir. 1968); *Hohmann* v. *Packard Investment Co.*, 399 F. 2d 711 (7th Cir. 1968). See, Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)," 81 Harv. L. Rev. 356 (1967).

> remember that the recent amendments were specifically designed to broaden the usefulness of the class action device. . . . By overemphasizing the notice requirement that purpose may be defeated. . . . To require the [4] present plaintiffs to provide immediate actual notice to each member of the class involved [over 200,000] would, for all practicable purposes spell the immediate end to this litigation

It should also be noted that the Judicial Panel on Multi-District Litigation has used Judge Wyatt's notice in the present case as the model for federal trial courts. *Manual for Complex and Multidistrict Litigation*, 1 Pt., 2 Moore, App. 1.65 (1970). If this type of litigation is to be entertained at all, therefore, the methods of notice used by the district court here would appear adequate to meet the due process problem.

There is one aspect of the manner in which the consumer class recovery was handled that does present some difficulty, although not mentioned by appellants, and that is allowing the states to recover on behalf of this class without requiring any affirmative indication from individual members that they wished to assign their claims in this manner. There are some cases where the courts have required class members to give notice that they wish to participate.[6]

We conclude, however, that the use of what might be termed the "Book-of-the-Month-Club" procedure in these

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6. *Philadelphia Electric Co.* v. *Anaconda Brass Co.* (supra at 459); *Harris* v. *Jones*, 41 F.R.D. 71, 74-75 (D. Utah, 1966); *Iowa* v. *Union Asphalt and Reading Oils, Inc.*, 281 F. Supp. 391, 404 (S.D. Iowa, 1968); but see, *Kronenberg* v. *Hotel Governor Clinton, Inc.*, 281 F. Supp. 622, 625 (S.D.N.Y. 1968).

circumstances should be permitted. The notice stated that those not filing individual claims by a certain date would be assumed to be authorizing the state through its Attorney General to recover on their behalf. Presumably there were among this group some who read the notice and made an affirmative decision to assign their claims. Undoubtedly there were also those who did not receive notice, and it is with this group we should be concerned. Since under the revised rule those in a (b)(3) class who do not elect to opt out will be bound by the judgment, it is difficult to see how those who do not receive notice but on whose behalf damages are awarded to the state are in any way harmed by permitting the use of this procedure. To require those who wish to authorize the state to recover for them to affirmatively notify the court to this effect would obviously, as a practical matter, be likely to reduce the amount of these recoveries to a minimum.

The other points raised by appellants appear to be clearly without merit and can be dealt with summarily. Appellants make several rather vague charges of conflict-of-interest as to various counsel for both the wholesaler-retailer class and the government plaintiffs. The district court specifically found that "from the affidavits submitted and [from] the Court's own knowledge of the progress of these negotiations, it is clear that the proposed compromise was the result of good faith bargaining at arm's length." The appellants have suggested nothing of substance which would cast doubt on this conclusion.

Appellants also attack the wholesaler-retailer notice of February 16, 1970 concerning the settlement conference and hearings for failure to mention the plan of allocation submitted by the Committee of Counsel for the wholesaler-retailer class. This is erroneous since the notice clearly

referred to the plan and invited any interested party to inspect it at the clerk's office.

Appellants also complain that the wholesaler-retailer notices (of June, 1969 and February, 1970) were mailed only to wholesalers and retailers in business as of June, 1969, and therefore failed to notify druggists who went out of business prior to that time. This contention is without merit since the second notice went beyond the Clark-O'Neill trade list to include anyone whose name was available. In addition, it appears that at a later stage in these proceedings when the district court administers the intra-class distributions, individual claims will again be considered.

Some of the appellees have suggested that the taking of this appeal was solely to obtain for the appellants the extra month's interest (some $640,000) as provided in the escrow agreement. There is a letter dated December 18, 1969 from counsel for the minority group of wholesaler-retailers, Edward A. Berman, which suggests that this may be the case. In that letter Mr. Berman states: "'Also, our group is convinced that the defendant's modified plans as accepted by most of the committee members invites and demands an appeal from the allocation order because, in our opinion, an appeal is the only way that the final order can be delayed beyond the thirteenth month." Under the escrow agreement, this extra month's interest, which, of course, is not an insubstantial amount in this case, would otherwise have accrued to the government entity plaintiffs and the classes they represent. Sections 1912 and 1927 Title 28 of the United States Code and Rule 38 of the Federal Rules of Appellate Procedure provide that the court may award damages and double costs to the appellee in cases of frivolous and vexatious appeals. The imposition of such sanctions, however, is highly unusual and requires a clear

showing of bad faith on the part of appellants. We are unable to find sufficient evidence in the record to warrant such action.

Finally we wish to commend Judge Wyatt for the skill and diligence which he has demonstrated in conducting this difficult and complex litigation.

Affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-338

COTLER DRUGS, INC., ET AL. and LOUIS PATLOGAN, formerly doing business as PATLOGAN'S WESTERN PHARMACY, *Petitioners,*

v.

CHAS. PFIZER & CO., INC., STATE OF WEST VIRGINIA, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-338

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v.

CHAS. PFIZER & CO., INC., STATE OF WEST VIRGINIA, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION FOR CITY, COUNTY AND STATE RESPONDENTS

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York is reported at 314 F. Supp. 710. It is reprinted in Appendix I of the Petition, pp. 1-86, and will be cited herein as "Pet. App. I." The unani-

mous decision of the Court of Appeals for the Second Circuit is reported at 440 F. 2d 1079. It is reprinted in Appendix II to the Petition, pp. 1-25, and will be cited herein as "Pet. App. II." Page references will be to the appendices in the Petition.

JURISDICTION

The court of appeals had jurisdiction under 28 U.S.C. § 1291, the district court having made appropriate determinations under Fed. R. Civ. P. 54(b). See Pet. App. I at 85.[1] The judgment of the court of appeals was entered on March 29, 1971. The petition for a writ of certiorari was filed on June 25, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did the Court of Appeals err in affirming, as a proper exercise of judicial discretion, the district court's approval of a class action settlement endorsed by virtually all parties except these petitioners which allocated $12 million to the druggist class to which they belong?

RULE INVOLVED

Rule 23(e) of the Federal Rules of Civil Procedure provides as follows:

> (e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

[1] Petitioners' statement (Pet. 2) that jurisdiction of the court below was based on 28 U.S.C. § 1292(b) is erroneous.

STATEMENT

The petition, filed on behalf of some 51 of 55,000 druggists involved in this litigation, asks this Court to upset an overall settlement encompassing 66 private antitrust actions seeking damages for alleged price-fixing and other antitrust violations by five major producers of broad-spectrum antibiotic drugs.[2] The remaining representatives of the druggist class, as well as all other parties, oppose the petition.

Because most of these actions were brought as class actions, the settlement required the approval of the district judge to whom all of the actions had been assigned for pretrial proceedings pursuant to 28 U.S.C. § 1407. Following notices to members of the affected classes and a series of hearings over a period of eighteen months, District Judge Wyatt approved the compromise on September 29, 1970, subject to further administrative proceedings relating to the distribution of the settlement amounts (Pet. App. I). Judgment was entered under Rule 54(b) and, on appeal, the court of appeals affirmed unanimously (Pet. App. II).

The background of these cases, the first of which began in 1964, the events leading up to the compromise, and the factors underlying its approval are set forth in detail in Judge Wyatt's exhaustive opinion (Pet. App. I). Initially, defendants offered a total of $100 million in settlement of all claims for the period 1954-1966

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[2] Chas. Pfizer & Co., Inc.; American Cyanamid Company; Bristol-Myers Company; Olin Mathieson Chemical Corporation (Squibb); and The Upjohn Company. The first three of these companies are defendants in the criminal action before the Court in *United States* v. *Chas. Pfizer & Co., Inc., et al.*, No. 70-72, certiorari granted, May 3, 1971. The pendency of that case, as we show at 18 *infra*, does not affect this one.

brought by or on behalf of (1) cities, counties, states, and other non-federal governmental entities (the "CCS plaintiffs") on account of their direct purchases of drugs and purchases by and for recipients of welfare and other aid, (2) wholesale and retail druggists, and (3) individual consumers.[3] See Pet. App. I at 23-24.

After most of the participants in the litigation (including petitioners, see J.A. 60, 71-72)[4] indicated their acceptance in principle of the $100 million settlement offer, the district court structured the cases so as to facilitate further negotiations and proceedings. In substance, three classes of plaintiffs were established to correspond with the three categories of claims covered by the settlement: the CCS class, the wholesaler-retailer class and the consumer class, with each governmental entity the class representative for its resident consumers (see Pet. App. I at 25-27; J.A. 52-75). Notices approved by the court were mailed to each known claimant in each of the classes; a recognized commercial mailing list was used to distribute the notices to retailers and wholesalers and consumers

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[3] The CCS plaintiffs ultimately included every state, the District of Columbia, Puerto Rico, and a number of cities and counties (see Pet. App. I at 21-23). Seven states and several other governmental entities subsequently elected not to join in the settlement. A number of cases also remained pending separately with respect to claims by the United States, private hospitals, insurance companies, agricultural users and others; these cases and those of the governmental entities not joining in the settlement are not involved here.

[4] The abbreviation "J.A." refers to petitioners' appendix in the court below; "CCS App. refers to the appendix filed in that court by the State of Alabama, et al. Both of these appendices are in the record transmitted to this Court, and we have lodged additional copies with the Clerk for the Court's convenience.

were given notice by publication.[5] These notices described the settlement proposal, advised class members of their right to exclude themselves from the settlement, and directed them to file their claims with the clerk of the court if they wished to participate. Consumers were further advised that if they did not exclude themselves and did not

> "make an individual claim by August 16, 1969, that will constitute an authorization to the Attorney General [or other appropriate chief law officer] to utilize whatever money he may recover as your representative for the benefit of the citizens of your State in such manner as the Court may direct." [CCS App. 27; see Pet. App. I at 27-29.]

In response to the notices, claims were filed in the summer of 1969 by about 38,000 consumers and 4,100 druggists. Forty-two consumers and some 1,500 druggists elected to exclude themselves from the settlement; many of those druggists did so because they believed "that they were not damage[d] and therefore wished to make no claim" (Pet. App. I at 81; see *id.* at 31).

There then followed—as contemplated by the defendants' initial offer—negotiations among representatives of the plaintiff classes (including the wholesaler-retailers) concerning allocation of the settlement

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[5] The consumer notices appeared in quarter-page advertisements in every daily newspaper of general circulation in each state; advertisements in Spanish and Japanese were published in newspapers in those languages (CCS App. 27-29). There were also a number of radio-television announcements, a number of Congressmen sent their constituents additional notice, many attorneys general made public statements announcing the settlement, and, as a news story, the consumer settlement otherwise received widespread publicity in the public media.

amount. Since the plaintiffs could not agree, the defendants specified a plan of allocation in accordance with the rights they had reserved in their offer, electing a modification of the "Alabama Plan" that had been proposed by counsel for thirty states and other governmental entities (Pet. App. I at 40-41). This plan, which is described and discussed in detail in the district court's opinion (especially at Pet. App. I at 32-39 and 49-67), provided—in its ultimate outline—for payments of (1) about $48,200,000 to the governmental claimants on account of their institutional purchases and payments for recipients of welfare and other aid; (2) about $12,000,000 to wholesaler-retailers (see Pet. App. I at 49, 40-41); and (3) about $32,500,000 for consumers, with the remainder after payment of individual claims to be used by each state or other entity for public health purposes to be approved by the court (Pet. App. I at 35-36; see CCS App. 33-35).[6]

A major point of dispute in these negotiations—and the focus of the present petition—was the amount to be allocated to the wholesaler-retailer class. Counsel for that class had submitted a plan seeking $40 million, that is, the entire surplus over the direct governmental claims, which would have left nothing for consumers. All other parties believed that the druggists were entitled to nothing, since they had passed on any overcharges to their customers and indeed—because almost

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[6] The bases for these allocations among the three classes (and the further allocations among the various states and other entities) are described in the district court's opinion. It should be noted that the original figure of $100 million was reduced to take account of the CCS entities which "opted out" of the settlement. There will be some further reductions because of administrative expenses (Pet. App. I at 50).

all used a uniform percentage markup—had actually benefitted (Pet. App. I at 35). The original Alabama Plan allocated $3 million for the druggists' claims. After intensive negotiations, there was agreement (in which nearly all counsel for the druggist class joined) to increase this amount by immediately depositing the whole settlement amount in escrow pending final distribution and assigning the interest over a 13-14 month period to the druggists; thus, the actual amount received by that class would be about $12 million (Pet. App. I at 40-41; Pet. App. II at 8-9, 24).

After appropriate further notice to all parties (see Pet. App. I at 45-49) the district court held a two-day hearing on the proposed compromise and received numerous written submissions and oral statements. The major objection to the plan before the court came from petitioners, who sought an allocation of $40 million at the expense of the consumer classes; the $12 million allocation for druggists was, however, "strongly supported by nearly all the representatives of the wholesaler-retailer class." (Pet. App. I at 67-69, 77.)

After detailed consideration, the district court concluded that the settlement plan agreed upon by the parties was fair, reasonable, and adequate (Pet. App. I at 69-86). The court of appeals agreed with the district court's assessment of the applicable law and found that it had appropriately exercised its discretion in evaluating the settlement. It concluded by "commending" Judge Wyatt "for the skill and diligence which he has demonstrated in conducting this difficult and complex litigation" (Pet. App. II at 25). On June 7, 1971, this Court denied petitioners' application for recall of the mandate.

ARGUMENT

I. There Is No Occasion for Further Review, After the Court of Appeals' Unanimous Affirmance, of the District Court's Exercise of Its Discretion in Accordance With Well Settled Standards.

Petitioners urge this Court to decide far-reaching questions concerning the respective rights of wholesalers-retailers and consumers to recover in private treble-damage actions under the antitrust laws. However, as the district court correctly noted, the very purpose of the compromise was to avoid the necessity of litigating questions of fact and law concerning the entitlement of these classes to recover. Thus, the only appellate issues with respect to the terms of the settlement have been whether the district court applied an incorrect standard in assessing the settlement or abused its discretion in giving its approval. There is no reason for further review of the court of appeals' unanimous affirmance on both of these points.

A.

The district court was fully conscious of its responsibility "for the protection of the many class members whose interests are involved but who do not appear in the action." Noting that "[a]pproval should be given if the settlement offered is fair, reasonable, and adequate" (Pet. App. I at 69), the court meticulously followed the standards articulated by this Court in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U.S. 414, 424-425, and countless lower court decisions.[7] This is

[7] See, *e.g.*, *In Re Prudence Co.*, 98 F.2d 559, 560 (2 Cir. 1938); *Connecticut Ry. & Lighting Co.* v. *New York, N.H. & H.R. Co.*, 190 F.2d 305, 308 (2 Cir. 1951); *Daniel Hamm Drayage Co.* v.

not a case like *Cohen* v. *Young,* 127 F. 2d 721 (6 Cir. 1942), to which the petitioners refer, or *Protective Committee,* where orders approving settlements were set aside because the district courts had failed to make independent evaluations of fairness. Thus, there is no genuine issue here as to the legal standards that guided the district court's discretion in approving the settlement.

Nor do petitioners present even a colorable claim that the district court's careful and detailed evaluation of the proposed settlement involved any abuse of discretion.[8] Following the court of appeals' thorough review, further examination of the matter by this Court would not even conceivably be called for in the absence of an unusual degree of error that is not remotely suggested by the petition.

In substance, the petition is based upon the erroneous proposition that the courts below were called upon to litigate the relative merits of the various plaintiffs' claims as if no settlement had been agreed upon at all. But the judicial function in reviewing the adequacy and fairness of a settlement does not contemplate the determination of uncertain legal issues. Such a re-

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Willson, 178 F.2d 633, 635, 636 (8 Cir. 1949); *In re California Associated Prod. Co.,* 183 F.2d 946, 950 (9 Cir. 1950); *Norman* v. *McKee,* 431 F.2d 769 (9 Cir. 1970), *cert. denied sub nom. ISI Corp.* v. *Myers,* 401 U.S. 912.

[8] A recent decision of the Judicial Panel on Multidistrict Litigation made the following observation with respect to Judge Wyatt's consideration of this settlement: "We doubt that any other single judge could have done so well. Certainly no one could have been more conscientious, diligent and scrupulously fair to all parties." *In Re Multidistrict Civil Antitrust Actions Involving Antibiotic Drugs,* 320 F.Supp. 586, 588 (J.P.M.L. 1970).

quirement would undermine the public policy which encourages settlements. As stated in *Florida Trailer and Equipment Co.* v. *Deal*, 284 F. 2d 567, 571 (5 Cir. 1960).

> "[Settlements] could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. Parties would be hesitant to explore the likelihood of settlement apprehensive as they would then be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and hence no basis for a compromise."

As we shall now show in greater detail, the courts below properly considered and rejected, in the light of this principle, all of the contentions about the merits of the settlement that petitioners seek to present here.

B.

1. Consistent with the settlement standards discussed above, the district court held that the settlement should be disapproved as unfair to druggists only if it could be established that "the damage to [that] class is easily provable and, as a matter of law, cannot be denied by defendants" (Pet. App. I at 79). In fact, the court found the contrary to be more likely, since

> "According to affidavits of experts in the field * * * the overwhelming majority of drug stores in the period 1953-66 charged for prescription drugs a uniform mark-up of 66⅔% over cost. If so, this would mean that any overcharge by defendants in violation of the antitrust laws was passed on to the end use purchaser. The result is that wholesalers and retailers, far from sustaining damages, made substantial profits from any antitrust violations." [Pet. App. I at 79.]

Petitioners object to this finding, which was expressly approved by the court of appeals (Pet. App. II at 17), calling it an "exceptional error of fact" (Pet. 26, 69) based only on a single affidavit (Pet. 19-20). But even by misstating the record,[9] petitioners cannot avoid the settled rule that this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank and Manufacturing Company* v. *Linde Air Products Company,* 336 U.S. 271, 275; *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635.

2. There is no substance to petitioners' contention that *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481, would require—if the cases were litigated—that the entire recovery for overcharges resulting from the manufacturers' antitrust violations be

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[9] The district court had before it the affidavit of Dr. William S. Apple, Executive Director of the American Pharmaceutical Association, the national professional society of pharmacists in the United States (J.A. 220-222); the affidavit of William Walker, former president of the National Wholesale Druggists Association (J.A. 223-224); the "Red Books" referred to in Dr. Apple's affidavit which showed the manufacturer's suggested selling price to the consumer as being 66⅔% more than the published price to the druggist (J.A. 221-222); a computer analysis of the 4,100 claim forms filed by wholesaler-retailer claimants (CCS App. 92); and the statement of Mr. Rubenstein, one of petitioners' counsel, who acknowledged that it "has been historically true" that the retailers and wholesalers got back every dollar they paid for the drugs plus their markup (CCS App. 98). In addition, the district court relied on statements from many of the 1,500 druggists "opting out" of the settlement (*e.g.,* J.A. 189-191), who recognized that, far from suffering injury, they profited at the expense of their customers (Pet. App. I at 81), as well as the records on appeal in both the Federal Trade Commission and criminal proceedings (Pet. App. I at 71, 79-80).

given to the wholesaler-retailers (the first purchasers) even though they passed them on to the ultimate consumers and so were not injured. While the district court was not called upon to decide this issue as in a litigated case, both courts below gave thorough consideration to the issue and properly concluded that the opposite was likely, and any recovery by the wholesaler-retailers would be highly improbable as a matter of law. They noted that if this case were tried it would differ from *Hanover* in a number of crucial respects (Pet. App. I at 80-81; Pet. App. II at 13-17). *Inter alia,* the situation here closely resembles the "cost-plus" example given in *Hanover* to indicate the proper application of the "pass-on" principle; moreover, application of that principle here would serve not to free defendants from liability but to channel the recovery to the plaintiff consumers who actually paid the overcharges rather than to the druggists who passed them on and, indeed, profited in the process.

3. The startling and unfounded contention that consumers overcharged because of price-fixing have no right to recover under the antitrust laws (Pet. 28-30, 55)[10] is irrelevant to the fairness of the settlement to

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[10] The proposition ignores 65 years of decisions which have already settled that question to the contrary. See, *e.g., Chattanooga Foundry & Pipe Works* v. *City of Atlanta,* 203 U.S. 390, 396, 399; *Mandeville Island Farms* v. *American Crystal Sugar Co.,* 334 U.S. 219, 236; *Armco Steel Corp.* v. *State of North Dakota,* 376 F.2d 206, 210-211 (8 Cir. 1967).

Commonwealth Edison Co. v. *Allis-Chalmers Mfg. Co.,* 315 F.2d 564 (7 Cir. 1963), upon which petitioners rely (Pet. 29), in no way supports their position. In that case, the court of appeals simply held, on the authority of *Keogh* v. *Chicago & N.W. Ry. Co.,* 260 U.S. 156, that consumers had no claim cognizable in an anti-

petitioners or anyone else. The district court found in the exercise of its discretion that the allocation of over $12 million to petitioners' class—an allocation enthusiastically endorsed by the great majority of that class—was more than adequate under all the circumstances. The few dissident members of the wholesaler-retailer class have utterly failed to establish any abuse of discretion in that finding, which the court of appeals has approved. Accordingly, they have no cause for complaint that the defendants also chose to make payments for the benefit of injured consumers.

Similarly, petitioners have no grounds for complaining that the courts below allowed CCS entities to recover as trustees on behalf of those consumers who filed no claims (Pet. 42). Their argument here is based on a misstatement of the lower courts' basis for approving this aspect of the settlement. The states'

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trust action when the impact of a conspiracy on them only "took the shape of allegedly higher rates paid for utility services—rates established as legal by the Illinois Commerce Commission"; thus intervention was denied and consumers were remitted to their remedies before the Commission. 315 F.2d at 567. No such unusual element is present in these cases, and the impact on consumers is direct.

Mangano v. *American Radiator & Sanitary Corp.*, 438 F.2d 1187 (3 Cir. 1971), affirming 50 F.R.D. 13 (E.D. Pa. 1970), upon which petitioners also rely (Pet. 29, 42), is likewise inapposite. The courts explained that an individual who buys a house for $20,000 cannot possibly show that his purchase price was affected by a manufacturer's overcharge of $10 on the bathtubs and sinks that went into it (50 F.R.D. at 26). In the present case, by contrast, the consumers bought the drugs in unchanged form and at a fixed mark-up. Thus the "insuperable difficulty" (*Mangano, supra*, 438 F.2d at 1188, quoting *Hanover Shoe*) facing the purchaser of houses in demonstrating injury is not faced by consumers who bought these drugs.

recovery in this case is not founded on a *parens patriae* claim as petitioners repeatedly imply (*e.g.*, Pet. 46-52). See Pet. App. II at 19. The district court expressly disavowed reliance on *parens patriae*[11] and allowed the CCS entities to represent consumers for purposes of settlement under Rule 23 of the Federal Rules of Civil Procedure. It will be time enough to decide in a *litigated* consumer class action case whether a state can recover as trustee on behalf of consumers who do not file individual claims. But this case was settled for the very purpose of avoiding litigation of this question among others; petitioners are in effect asking for an advisory opinion.[12]

Petitioners' assumption that any funds denied consumers or the states as trustees for consumers would redound to the benefit of the wholesaler-retailer class (Pet. 58) has no basis in reality. The terms of the defendants' settlement offer, which petitioners and virtually all others had accepted in principle, permitted the defendants to elect a method of allocation among classes after the plaintiffs had failed to agree among themselves on a common plan (J.A. 73). The allocation so elected was accordingly the only one before the district court for its consideration (*e.g.*, Sept. 15, 1969 tr. p. 37). While the court was called on to approve or disapprove the settlement as a whole, including that allocation, it had no power to direct the defendants to

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[11] CCS App. 10-11, 14.

[12] Moreover, any question as to the administration of payments to consumers and the disposition of any excess consumer funds held in trust by the states as representatives of the consumer class would be premature even if petitioners had standing to raise it, since such matters have been expressly deferred for the district court's future consideration.

settle the cases on a different basis or to "transfer" funds from one class to another (J.A. 73-74). Moreover, the court appropriately observed that "[i]nsistence on [the allocation sought by petitioners] would almost certainly have destroyed any chance of settlement" (Pet. App. I at 78).

II. Petitioners' Procedural Objections Do Not Warrant Further Review by This Court.

Petitioners raise a series of objections to the procedure followed by the district court. These contentions were carefully considered by the court of appeals, which not only rejected them but commended the district judge for his handling of this complex proceeding. Petitioners make no showing of error here, much less such grave error that this Court should intervene.

1. Petitioners contend that they were denied a hearing on the damages suffered by their class (Pet. 17-18). This is not true. At the two-day hearing on the fairness of the settlement, petitioners' counsel addressed the court at length on this issue and submitted memoranda and affidavits.

2. Petitioners also insist (Pet. 62) that they were denied a hearing on their conflict of interest charges against certain attorneys. Again, the facts are otherwise, since the court gave them every opportunity to ventilate and explore their charges fully (CCS App. 56-73, 75-87, 92-105). The charges were rejected by the district court, which had lived with the cases for more than eighteen months, and were found "to be clearly without merit" by the court of appeals, which observed (Pet. App. II at 23):

> "Appellants make several rather vague charges of conflict-of-interest as to various counsel for both

> the wholesaler-retailer class and the government plaintiffs. The district court specifically found that 'from the affidavits submitted and [from] the Court's own knowledge of the progress of these negotiations, it is clear that the proposed compromise was the result of good faith bargaining at arm's length.' The appellants have suggested nothing of substance which would cast doubt on this conclusion."

3. Petitioners object that the notice to consumers was defective because it resulted in an assignment of their claims to the state by all consumers who did not file individual claims (Pet. 58-59).[13] But petitioners have no standing to object to this, since monies received by the CCS entities on this basis would not otherwise go to the wholesaler-retailer class (see pp. 13-15, *supra*). In any event, the court of appeals, which carefully considered the point, was satisfied that the notice was proper (Pet. App. II at 22-23).

4. There is no substance to petitioners' objections concerning the notices to the wholesaler-retailer class. Petitioners claim that the original notice to that class was deficient because it did not state that the settlement amount had already been allocated; and, for that reason, they further claim that the class should have been given a second right to "opt out" of the settlement after the allocation was approved. But petitioner's factual premise is untrue; there had been no alloca-

[13] It should be noted that such funds are not state funds, but consumer funds held in trust by the State as class representative for the consumers (Pet. App. I at 36; CCS App. 5; see also *FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577, 584; *Bebchick* v. *Public Utilities Comm.*, 318 F.2d 187, 203-204 (D.C. Cir. 1963, *en banc*).

tion at the time of the original notice.[14] Accordingly, neither point has any basis. Nor are petitioners correct in contending that the wholesaler-retailer notices were improperly sent only to members of the class who were in business in 1969 (Pet. 63). As the court of appeals said,

> "This contention is without merit since the second notice went beyond the Clark-O'Neil trade list to include anyone whose name was available. In addition, it appears that at a later stage in these proceedings when the district court administers the intra-class distributions, individual claims will again be considered" [Pet. App. II at 24.]

III. The Pendency in This Court of Hawaii v. Standard Oil Company, No. 70-49, and United States v. Chas. Pfizer & Co., Inc., No. 70-72, Does Not Affect This Case.

Petitioners seize on the grant of *certiorari* in two other cases in an effort to give substance to their petition: *Hawaii* v. *Standard Oil Company*, No. 70-49, *cert. granted*, 401 U.S. 936; and *United States* v. *Chas. Pfizer & Co., Inc.*, No. 70-72, *cert. granted*, May 3, 1971 (Pet. 52-57). But the ultimate outcome of neither of these cases can affect the correctness of the judgment below.

Petitioners rely on the *Hawaii* case because one of the counts in Hawaii's complaint asserted a claim by the state on behalf of its consumers as *parens patriae*. But the counts below in this case did not proceed on a *parens patriae* theory. Moreover, even petitioners concede that the *parens patriae* issue they seek to raise

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[14] The district court explicitly found that "There was at no time any agreement by counsel for defendants with any counsel for plaintiffs as to what amounts would be allocated to CCS entities, to consumers or to wholesalers and retailers" (CCS App. 21).

here was not raised on appeal by Hawaii—which now pursues only its claim for injury to its economy—and was not decided by the court of appeals in that case (Pet. 53-54).

Nor should the pendency of *United States* v. *Chas. Pfizer & Co.* disturb prompt implementation of this settlement. The ultimate outcome of the criminal litigation might be relevant if there were some question as to the adequacy of the settlement amount as a whole, but that is not disputed. Petitioners accepted the $100 million proposal "as offered" (J.A. 60, 71-72), and no petitioner questioned its fairness either in the district court or in the court of appeals (see Pet. App. I at 68, II at 9). Petitioners' only objection is to their share in the settlement, something that could in no way be affected by the result of the criminal case.

CONCLUSION

The prolixity of the petition cannot mask the fact that it presents no issue warranting review by this Court. The district court should be allowed to proceed promptly to conclude the administration of the settlement of this protracted litigation.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1971

No. ~~1664~~ 70-338

COTLER DRUGS, INC., *et al.* AND LOUIS PATLOGAN, FORMERLY DOING BUSINESS AS PATLOGAN'S WESTERN PHARMACY, PETITIONERS,

versus

CHAS. PFIZER & CO., INC., *et al.*, STATE OF WEST VIRGINIA, *et al.*, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT COURT

BRIEF IN OPPOSITION FOR RESPONDENT STATES OF SOUTH CAROLINA AND MONTANA

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Supreme Court of the United States

OCTOBER TERM, 1971

No. 1884

COTLER DRUGS, INC., *et al.* AND LOUIS PATLOGAN, FORMERLY DOING BUSINESS AS PATLOGAN'S WESTERN PHARMACY, PETITIONERS,

versus

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT COURT

BRIEF IN OPPOSITION FOR RESPONDENT STATES OF SOUTH CAROLINA AND MONTANA

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York is reported at 314 F. Supp. 710. It is included as Appendix I of the Petition and will be referred to herein as "Pet. Appen. I." The opinion of the Court of Appeals for the Second Circuit, unanimously affirming the district court, is reported at 440 F. (2d) 1079. It is included in the Petition, as Appendix II, and will be referred to as "Pet. Appen. II." Page cites will be made to these appendices.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1). The judgment of the Court of Appeals for the Second Circuit was entered on March 29, 1971, and no rehearing or extension of time was sought or granted.

QUESTION PRESENTED

Did the court of appeals err in affirming the district court's approval of a class action settlement which gave certain allocations that the district court found to be fair, reasonable and adequate.

STATUTES INVOLVED

Rule 23(e) of the Federal Rules of Civil Procedure, Title 28, United States Code of Laws, provides:

> (e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

STATEMENT

The State of South Carolina instituted one of sixty-six treble-damage actions filed against certain manufacturers of broad-spectrum antibiotic drugs charged with antitrust violations under the Sherman Act, 15 U.S.C. §§ 1 & 2. Compromise of these claims was effected between the defendant manufacturers and the plaintiffs to the ensuing class actions. The plaintiffs were comprised of two classes, a CCS class (cities, counties and states representing themselves and all consumers within their jurisdiction) and a wholesaler-retailer class, representing druggists throughout the United States.

The proposed settlement was approved pursuant to Fed. R. Civ. P., Rule 23(e) by District Judge Wyatt on

September 18, 1970. Pet. Appen. I. On appeal from the district court's approval by the petitioners herein, the Court of Appeals for the Second Circuit, on March 29, 1971, unanimously affirmed the approval of the settlement. Pet. Appen. II. The petitioners now continue in their attempt to impose a reallocation of the settlement fund, which would favor the wholesaler-retailer class, to the great detriment of the consumer class.

The State of South Carolina adopts as its further statement of the case Judge Wyatt's exhaustive statement of the proceedings as contained in Pet. Appen. I.

ARGUMENT

I

In establishing procedures for providing notice of the proposed settlement of a class action, as is required by Fed. R. Civ. P., Rule 23(e), did the district court commit errors of law or abuses of discretion in its prescription of the manner in which notice was to be furnished to members of the class?

A. The petitioners have raised the issue of notice to the consumers and have objected that such notice was actually an assignment by silence and therefore deprives the consumer of due process. Pet. 58-59. One would assume the petitioners are speaking of the possible consumers that did not actually see the notice by publication rather than the ones that saw the notice and made the decision to authorize their respective Attorney General to recover on their behalf. The court of appeals considered this issue, Pet. Appen. II at 22-23, and stated on that question:

> Undoubtedly there were also those who did not receive notice, and it is with this group we should be concerned. Since under the revised rule those in a [Rule] (b) (3)class who do not elect to opt out will

> be bound by the judgment, it is difficult to see how those who do not receive notice but on whose behalf damages are awarded to the state are in any way harmed by permitting the use of this procedure. To require those who wish to authorize the state to recover for them to affirmatively notify the court to this effect would obviously, as a practical matter, be likely to reduce the amount of these recoveries to a minimum. Pet. Appen. II at 23.

The three cases cited for the petitioners' position, Pet. 58-59, were cited, discussed and distinguished in briefs before the court of appeals and that court apparently found nothing constitutionally defective, an irreconcilable difference in decisions or abuse of discretion.

B. The petitioners also attack the notice sent to the wholesaler-retailer class in two aspects. Pet. 63. The contention of the petitioners that notice was sent only to those wholesalers-retailers in business in 1969, and therefore defective, Pet. 63, was dealt with by the court of appeals which said,

> This contention is without merit since the second notice went beyond the Clark-O'Neill trade list to include anyone whose name was available. In addition, it appears that at a later stage in these proceedings when the district court administers the intra-class distributions, individual claims will again be considered Pet. Appen. II at 24.

A further objection of the petitioners is that the settlement offer had a "'predetermined allocation." Pet. 64. This is completely untrue as can be shown by the district courts decision, Pet. Appen. I. An offer of settlement dated February 6, 1969, was to the effect that the $100,000,000 was unallocated and that anyone accepting the settlement could present to the court a proposed plan of allocation. Pet. Appen. I at 24. Pursuant to a court order of June 16, 1969, and modified on June 18, 1969, notice was given to

members of the wholesale-retail class giving each member an opportunity to opt out of the $100,000,000 settlement, which was not allocated. Pet. Appen. I at 28. Because of the formula set forth in the offer of settlement by the defendants of February 6, 1969, all accepting plaintiffs then could submit a proposed plan of allocation by September 2, 1969. Pet. Appen. I at 31. Several plans were presented. Pet. Appen. I at 31, 32. It appearing that the plaintiffs could not agree on a proposed allocation plan, the defendants, pursuant to the settlement offer of February 6, 1969, filed their "Election by Defendants to Proceed with a Modified Plan Allocation" on October 20, 1969. Pet. Appen. 1 at 41. A hearing was then held on March 24, 1970, before District Judge Wyatt to determine the adequacy of the Modified Plan of Allocation by the Defendants, pursuant to notice by the court of the hearing on February 6, 1970. Pet. Appen. I at 46 and 67. It was the decision of Judge Wyatt rendered on June 24, 1970, Pet. Appen. I, that was the final determination of the allocation to the petitioners. The petitioners' plea of a predetermined allocation is unfounded as evidenced in the record of this action.

The further claim of the petitioners that they should have been offered a second right to opt out when the court changed its scheme of administration of the settlement in mid-stream, Pet. 65, is also unfounded as evidenced by the record of this action as there was no change.

II

In approving the settlement of the national class action involved herein, such approval or disapproval being required by Fed. R. Civ. P., Rule 23(e), the district court did not commit any errors of law in ascertaining the standards upon which to base its approval, nor did the district court abuse its discretion in the application of these proper standards for settlement.

A. The very essence of a settlement proceeding is that it allows the parties thereto to satisfy claims without having to litigate the merits of the case. Indeed, to litigate the legal and factual issues would emasculate any efforts at a compromise as one party or the other would lose most, if not all, incentive to mitigate its position, thereby leaving the weakened party with the choice of a forced settlement or a costly and perhaps even more ruinous litigation. See *Florida Trailer and Equipment Co. v. Deal*, 284 F. (2d) 567 (5th Cir. 1960); Pet. Appen. II at 10-11; Pet. Appen. I at 70.

Rule 23(e) of the Federal Rules of Civil Procedure was drafted and enacted in order to permit parties to class actions to avoid the expense and uncertainty of litigation and to encourage settlement. *Florida Trailer and Equipment Co. v. Deal* at 571; *Uline v. Uline*, 205 F. (2d) 870 (D. C. Cir. 1953). Accordingly, the trial courts are vested with flexible discretionary powers to approve or disapprove proposed settlements in order to protect the interests of the members of the classes involved, while at the same time forwarding the worthy objectives of compromise.

Recognizing these facts, federal courts, to include this Court, have laid down general standards by which trial courts can measure the propriety of approving proposed settlements, In *Protective Committee for Independent Stockholders of TMT Trailer Ferry v. Anderson*, 390 U. S. 414,

424 (1968), this Court in reviewing on certiorari an approval of compromises of claims against a debtor stated:

> There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the . . . judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation. *Id.* at 424-425.

It is submitted that this guidance is equally pertinent to compromises under Fed. R. Civ. P., Rule 23(e) and is the proper standard upon which trial courts may rely, affording both the flexibility necessary to effect compromise, and the due process protection of members of the classes to the suit. Hence there was no error of law committed by the district court in adopting standards, as articulated by this Court in *TMT Trailer Ferry v. Anderson*, *supra*. Pet. Appen. II at 9-10; Pet. Appen. I at 69-70.

B. But notwithstanding the district court's adoption of proper standards by which to measure the merits of the proposed settlement, the petitioners make multiple allegations that the district court has abused its discretion in applying these standards to the facts of this case. However, this is a charge which the petitioners have failed to substantiate.

It is a well established legal principle that judicial discretion will not be disturbed unless there is a clear showing of abuse, and that showing must be borne by the petitioners. As was stated in *Connecticut Ry. & Lighting*

Co. v. New York, N. H. & H. R. Co., 190 F. (2d) 305 (2d Cir. 1951):

> It is well settled that the approval of a compromise is a discretionary order which can be reversed only upon a clear showing of an abuse of discretion. *Id.* at 308.

And in the case of *Delno v. Market St. Ry. Co.*, 124 F. (2d) 965 (9th Cir. 1942), the court defined discretion and its abuse as follows:

> "[D]iscretion" is defined as: "The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court." 1 Bouv. Law Dict., Rowles' Third Revision, p. 884 . . . Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action by the trial court, then it cannot be said that the trial court abused its discretion. *Id.* at 967.

Accord, *Lines v. Falstaff Brewing Co.*, 233 F. (2d) 927 (9th Cir. 1956).

The petitioners argue that abuse was committed for divers reasons. First they say that the district court misconstrued, misapplied, and misconceived the decision of this Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U. S. 481 (1968). Pet. at 25-28. The petitioners contend that the *Hanover* case proscribes the use of "pass-on" as a defense to an anti-trust suit, and that consequently the district court's progmatic consideration of the clear fact that the wholesaler-retailer class suffered no injury, because it passed on the increase to the consumers at a substantial profit, constitutes a violation of principles laid down in *Hanover*. However, the petitioners completely ignore the

distinguishing characteristics of *Hanover* as compared with the case at hand. These distinctions include the facts that considerations of "pass-on" are not being used to allow the defendants to escape liability, and that such determinations will not frustrate private treble-damage claims. These issues were thoroughly discussed and considered by the circuit court. See Pet. Appen. II at 12-17. In light of these facts, and because the task of the district court was not to litigate the legal merits of applying a "pass-on" defense to the facts of this case, but rather only to weigh the strength of the plaintiffs' case against the settlement offer to insure that the settlement was fair, reasonable, and adequate, Pet. Appen. I at 69, it is clear that recognition that the petitioners had not been injured due to "pass-on" was not an abuse of the court's discretion.

The petitioners further allege that the decision of the Court of Appeals is in direct conflict with the decisions of other circuit courts as to questions of "pass-on," the standing of consumers to sue, and cost-plus situations. Pet. at 28. Aside from district court cases and cases of the Second Circuit subject to overrule, petitioners cite the following cases as conflicting on questions of the "pass-on" doctrine, and the standing of consumers to sue: *Commonwealth Edison Co. v. Allis Chalmers Manufacturing Co.*, 335 F. (2d) 203 (7th Cir. 1946); *Mangano v. American Radiator and Standard Sanitary Corp.*, 50 F.R.D. 13 (E.D. Pa.), aff'd 438 F. (2d) 1187 (3d Cir. 1971). Pet. at 29 However, these cases are founded on the same factual circumstances and policy considerations as was in *Hanover Shoe, Inc.* In these cases, retail purchasers face a substantial legal hurdle in establishing that any overcharge they have paid was a result of the manufacturers price fixing, thereby discouraging suits by individual retail consumers and insulating the price-fixers from liability. This is not the

situation with the present case, despite the fact that the petitioners refuse to recognize these critical distinctions. These facts are germaine to the discretionary actions of the district court and consequently the petitioners have failed to support their allegations of abuse.

Petitioners also allege conflicts of decisions with other circuit Courts as to questions of what constitutes a cost-plus situation within terms of *Hanover Shoe, Inc., supra.* Pet. at 31. They say the question turns in other circuits on whether there was in fact a cost-plus contract, and cite district court cases for authority. Pet. at 32. This spurious assertion is not worthy of this Court's consideration.

Petitioners further assert that the district court has abused its discretion by failure to protect the interests of the members of the litigating classes through failure to fully consider all facts, and petitioners make further nebulous assertions as to the district court relying too heavily on collusive advice of counsel. Pet. at 33-38. These allegations are without merit and are refuted by the records of the proceedings of the trial court, which court relied precisely on the guidance furnished by this Court in *Protective Committee for Stockholders of TMT Ferry, Inc. v. Anderson, supra.* Unlike the case of *Cohen v. Young,* 127 F. (2d) 721 (6th Cir. 1942), upon which the petitioners rely, Judge Wyatt diligently conducted full investigations of the case, and further completely satisfied himself that "the proposed compromise was the result of good faith bargaining [by opposing counsel] at arm's length." Pet. Appen. I at 71.

Another justification asserted by petitioners as reason for a writ to issue is that this Court has granted certiorari to review the reversal of the criminal conviction of three of the five defendants herein in *United States v. Chas. Pfizer,* 437 F. (2d) 957 (2d Cir. 1970). If the conviction is affirmed

then it is claimed that the rationale of the district court's decision in approving the settlement becomes unsustainable, Pet. at 56, and that consequently the criminal proceeding and this case should be reviewed together. However, what petitioners fail to consider is that the matter before this Court on this petition turns not upon what a fair, reasonable, and adequate decision might be in the future, but rather what it was on September 18, 1970 when Judge Wyatt issued his opinion. Consequently, this argument by the petitioners has no merit.

III

Should this court consider issues outside of the scope of the Judgment below?

Petitioners say: "Decision of court of appeals has practically eliminated private action under Section 4 of Clayton Act as a vital means of enforcing the Antitrust Policy of the United States and, therefore, is in conflict with decisions of the Supreme Court of the United States." Pet. at 21.

The petitioners state that the court of appeals decision here has made the public action exclusive by "virtually eliminating" the private action under §4 of Clayton Act, and that it has "given to public entities under a hybrid *parens patriae*—Rule 23 representation theory . . . the **exclusive** right to enforce the antitrust laws." Pet. at 24. They state further that "the thrust of the Court's opinion is to strike directly at the basis of the right of direct purchasers of the price-fixers to maintain actions for treble-damages under . . . the Clayton Act." Pet. at 21.

Nowhere do the petitioners explain, nor is it apparent, how the decision of the court of appeals fosters these alleged results. The court of appeals, in fact, felt that the settlement approved by the district court, if anything, encourages private enforcement of treble-damage claims. Pet.

Appen. II at 16. Petitioners insist on the temeritous assertion that the district court and court of appeals approved of the application of *parens partriae* doctrine in this case when both courts expressly rejected the *parens patriae* doctrine as constituting any foundation for their decisions. Pet. Appen. II at 18-19. The representation of the private consumers by the divers government entities was expressly accomplished through a class action under Fed. R. Civ. P. 23 and was effected in a proper manner to allow those private parties not wishing to settle to opt out, thus preserving their private right to litigate.

As to charges that direct purchasers from price-fixers have had their right of private suit affected by the settlement, it would appear that the petitioners misunderstand the nature of their motion before this Court for a writ of certiorari. The petitioners here apparently refer in this statement to the fact that for the purpose of settlement the district court approved a determination of fact that actual injury to the wholesaler-retailer class was nil due to the fact that the wholesaler-retailer class passed on their costs to the consumer and collected a substantial mark-up in the process.

However, the purpose of a settlement is not to litigate points of law and is not to establish the respective legal liability of the parties, one to the other—this would in fact defeat the settlement objectives of obtaining a rationale compromise between parties based on arms length negotiation. The task of the trial court under Rule 23(e) is to ascertain that such compromise is "fair, reasonable, and adequate," based on the court's view of the ostensible strength of the plaintiffs' case on its merits, balanced against the amount offered in settlement by the defendants. Pet. Appen. I at 69. This the district court has done, and this was approved on appeal.

The question before this Court is not one, as the petitioners would make to be so, of a determination of the legal question of whether a pass-on defense is legally proper under the facts of this case. It will be time enough to decide that question when it is actually litigated. The question before this Court is whether the district court misconstrued the law or abused its discretion in its determination that based on prior decisions of this Court, and more especially *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U. S. 481 (1968), that the monies offered the wholesaler-retailer were fair, reasonable, and adequate. Clearly the facts of the case, in light of existing law, show the judgment below to be proper.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certorari should be denied.

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Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-338

COTLER DRUGS, INC., et al. and LOUIS PATLOGAN, formerly doing business as PATLOGAN'S WESTERN PHARMACY,

Petitioners,

v.

CHAS. PFIZER & CO., INC., et al. STATE OF WEST VIRGINIA, et al., STATE OF NEW YORK, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT STATE OF NEW YORK'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-338

COTLER DRUGS, INC., et al. and LOUIS PATLOGAN, formerly doing business as PATLOGAN'S WESTERN PHARMACY,

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v.

CHAS. PFIZER & CO., INC., et al. STATE OF WEST VIRGINIA, et al., STATE OF NEW YORK, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENT STATE OF NEW YORK'S BRIEF IN OPPOSITION

The State of New York, one of the government respondents, opposes petitioners' petition for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit (440 F. 2d 1079) unanimously affirming the District Court's order and judgment (314 F. Supp. 710) approving pursuant to Rule 23(e) of the Federal Rules of Civil Procedure a proposed compromise and settlement of sixty-six antitrust class actions.

Question Presented

Whether the Court of Appeals erred in its evaluation and decision that the District Court's approval of a compromise and settlement of sixty-six antitrust class actions was proper and well within its discretion?

Statement of the Case

Petitioners Cotler Drugs and Louis Patlogan who did not have their way in negotiating for a larger share of the $100 million settlement proposal (J. App. 71)* and who failed to secure a judicial renegotiation of the settlement proposal by the courts below (314 F. Supp. 710; aff'd 440 F. 2d 1079 [2d Cir. 1971] (Cotler App. I, II), again seek judicial renegotiation for another chance to increase their share.

The State of New York, by its Attorney General, on behalf of itself and as representative of its political subdivisions and individual citizens joined with numerous co-plaintiffs in recommending approval of the "Alabama Plan," as modified, as fair and reasonable. The sum of $3.9 million was allocated to the State of New York and its class** (44 political subdivisions; 62 welfare districts; 4,235 individual consumers) (314 F. Supp. at 737). The dissenting minority's failure to have their way and their dissatisfaction with the majority approved division do not warrant its rejection and reversion of sixty-six multi-district class actions to a litigation status.

The settlement proposal (J. App. 71) adopting for its judicial administration, evaluation, and approval the proce-

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* References to petitioners' Joint Appendix below.

** See separate order and judgment, *State of New York* v. *Chas. Pfizer & Co., Inc.* (68 Civ. 845, S.D.N.Y.).

dural due process framework of Rule 23, Federal Rules of Civil Procedure, is not here challenged by petitioners. It is clear and unambiguous so that each class representative in the performance of its duties and obligations to class members, could prior to acceptance make adequate evaluation of its present and prospective effects and application. The settling parties and their class representatives were thus clearly identified (J. App. 71): "A. * * * states, counties, cities and their political subdivisions and agencies * * *. B. * * * wholesalers, retailers and individual consumers arising out of their purchases, including claims of states as *parens patriae* on behalf of their citizens or on behalf of classes including the state as a consumer and all other consumers in the state."

Moreover, each accepting class representative was fully apprised by its terms of the options, methods and procedures for the proposal and selection of multiple allocation plans (J. App. 73) and petitioners freely exercised their options (J. App. 81). Upon defendants' election as authorized by the settlement proposal (par. E [1], J. App. 73) of the allocation plan ("Alabama Plan," J. App. 101, as modified, J. App. 134) accepted by a majority of the government class representatives and by eleven of the thirteen members of the Committee of Counsel for the consolidated wholesaler-retailer class (J. App. 288, 307), and within the procedural due process provisions of Rule 23 provided in the settlement proposal—notice and hearing—the District Court made a careful and comprehensive analaysis and evaluation of all issues, contentions and circumstances (314 F. Supp. 710; Cotler App. I).

Opinions Below

The District Court (Wyatt, J.) held that the "Alabama Plan" with its calculations of purchases and adequacy of class allocations predicated upon reliable public and official sources of information (e.g., number of

hospital beds from American Hospital Association Guide (J. App. 120); state public assistance reimbursement from H.E.W. publications (J. App. 110, 121-123), was the "most comprehensive of the plans filed (314 F. Supp. at 727; Cotler App. I, 32) and that "[t]here is no sufficient reaosn for rejecting the method of division of the Alabama Plan" (*id.* at 744).

The Court of Appeals unanimously affirmed the trial court's approval as properly within its judicial discretion "commend[ing] Judge Wyatt for the skill and diligence which he has demonstrated in conducting this difficult and complex litigation" (440 F. 2d 1079; Cotler App. II, 25)—the second commendation (*In Re Multidistrict Civil Antitrust Actions Involving Antibiotic Drugs,* 320 F. Supp. 586, 588 [J.P.M.L. 1970]). It defined the scope of appellate review of the trial court's discretion by an "attempt to arrive at some evaluation of the points of law on which the settlement is based" without the need for "dispositive conclusions of the admittedly unsettled legal issues which the case raises" (440 F. 2d 1086; Cotler App. II, 11). Moreover, pursuant to this Court's recent declarations of national antitrust enforcement policy, the Court predicated its independent evaluation and affirmance of the exercise of the District Court's discretion upon the "result orientation with which the Court has approached the whole area of private treble-damage litigation" (440 F. 2d at 1087; Cotler App. II, 14).

REASONS FOR DENYING CERTIORARI

(I)

Petitioners' request that this Court exercise its discretion to review this settlement and make "positive pronouncement[s]" (Pet. 32); "clarify" (Pet. 52) and "exercise its supervisory powers" in the "construction of

Rule 23'' (Pet. 46), is predicated upon their exaggerated and fanciful fears and apprehensions of alleged conflicts of law in the opinions below which purportedly may adversely affect "future antitrust precedent and litigation" (Pet. 25).

Their exhaustive debate with each and every item and judicially approved criterion applied by the trial court in its comprehensive evaluation rebuts petitioners' contention that contrary to *Cohen* v. *Young,* 127 F. 2d 721 (6th Cir. 1942), the trial court "relied almost solely upon the recommendations of attorneys" (Pet. 34), and belies their allegation that the scope of appellate review here applied to a compromise raises a "direct conflict" (Pet. 33) between circuits.

They do not challenge the decision upon the traditional criteria of appellate review of discretionary orders in evaluating compromises, e.g. adequacy of the record and hearing to evidence an "informed judgment" (*Bysheim* v. *Miranda* [not officially reported] 44 N.Y.S. 2d 15, 22 [Sup. Ct. N.Y. Co. 1943]; the "canvass of factual aspects of the litigation" (*City of New York* v. *International Pipe & Ceramics,* 410 F. 2d 295, 298 [2d Cir. 1969]); the judge's experience including scope and length of assignment (*In re Prudence-Bonds Corporation,* 148 F. 2d 323 [2d Cir. 1945]); and the required balance and resolution of competing claims and relevant policies (*Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad Co.,* 363 U.S. 528, 535 [1960]).

Instead, in a transparent attempt to tailor the petition to this Court's criteria for the grant of *certiorari,* they seek to elevate "the evaluation of points of law upon which the settlement is based" (440 F. 2d at 1086; Cotler App. II., 11)—including the legal framework of the settlement proposal which identifies the consumer class and their class representatives which the petitioners and all settling parties accepted—to the status of judicial

precedent. An examination of some of petitioners' version of certain decisions discloses the absence of any real or potential conflict of judicial precedents warranting *certiorari*.

(II)

Petitioners' contention that the Court's approval of the trial court's designation of New York and other plaintiff states as representatives of individual purchasers of antibiotic drugs—similarly situated parties—constitutes the "creation of a new right contrary to existing authority" (Pet. 39), is makeweight. Rule 23(a), Federal Rules of Civil Procedure, provides that "[o]ne or more members of a class may sue * * * as representative parties on behalf of all * * *". States have assumed such responsibility before. See *State of New York* v. *Harper & Row Publishers* (Record, 68 Civ. 4205, S.D.N.Y., 69 Civ. 48 N. D. Ill.; Rule 23[e] approval of compromise and intra class allocation plan for 512 school districts, and 14 library systems with 551 member libraries); 301 F. Supp. 484 (N. D. Ill. 1969); *State of Iowa* v. *Union Asphalt*, 281 F. Supp. 391 (S. D. Iowa, 1968). As the Court of Appeals pointed out (Cotler App. II, 19), the District Judge upheld the right of the States as consumers under Rule 23(a) and, consequently, never reached the question of the States as *parens patriae*, contrary to the assertion of petitioners.

So far as New York is concerned it has statutory authority to seek restitution for wronged consumers, apart from common law. (Gen. Bus. Law, § 342b; Executive Law, § 63[1][12].)

(III)

Petitioners' contention that the District Court's application of *Hanover Shoe* v. *United Shoe Machinery Corp.*, 392 U. S. 48 (1968) has "destroyed" its certainty and

"will cause confusion in all the circuits * * *" (Pet. 25) and that "enforcement of the national policy has been lost" (Pet. 21), is simply a self-serving effort to collect the consumers' share of the settlement. This Court did not declare in that decision, as petitioners suggest, that in all cases the initial purchaser has the exclusive right to recover damages. The suggestion by petitioners of alleged potential conflict is refuted by the Court of Appeals' explanation of the settlement plan as consistent with antitrust policy (440 F. 2d 1088) that "the passing-on doctrine is not here being used as a defense to permit the defendants to escape liability, but rather as an attempt to award damages, insofar as is possible, to those who ultimately paid higher prices as a result of the collusive pricing, and to avoid giving a windfall gain to those who rather clearly were not injured." Moreover, the Court said that the District Court's consideration of wholesaler-retailers' arrangements for resale "at cost plus a set percentage markup (for wholesalers 16⅔%, for retailers 66⅔%)" was consistent with this Court's policy (440 F. 2d 1088; Cotler App. II, 17).

(IV)

The Court of Appeals correctly rejected petitioners' challenge to the adequacy of the Notice to consumers as the "best notice practicable under the circumstances * * *" (Rule 23[c] [2]) (440 F. 2d at 1090-1091; Cotler App. II, 21). The repetition of the challenge here is frivolous.

The District Court properly evaluated the compromise plan and the adequacy of the allocation to each class. It was not required to comparatively measure the adequacy of the inter-class allocation and, more particularly, to measure it and make readjustments by the size and number of each class' responses since Rule 23 does not require affirmative responses. One class cannot reach into the other class'

allocation as petitioners here contend, in order to cut into all or part of the consumers' share.

Moreover, the fairness and adequacy of each allocation having been separately evaluated and determined, there is no harm to petitioners or to anyone else—including class members who did not elect to opt out—as the Court of Appeals noted (440 F. 2d at 1091; Cotler App. II, 23) that any balance at this time, if any* will be distributed to the State "for the benefit of the citizens of [the] State in such manner as the Court may direct" (Cotler App. I, 28). Petitioners' objections (Pet. 58-59) are clearly without merit.

(V)

Nor can petitioners' here secure *certiorari* derivatively by their attempt to tag this case along with the grant of *certiorari* in *State of Hawaii* v. *Standard Oil Co.*, 401 U.S. 930 (1971) (Count II damage to economy) (Pet. 52, 54) on their mistaken assumption that there is presented to this Court a common forum to undertake a comprehensive examination of the "entire area of *parens patriae* recovery by states under Section 4 of the Clayton Act * * *" (Pet. 53). As we have stated the Court of Appeals concluded "evaluation of the *parens patriae* doctrine * * * is unnecessary because the trial judge "made it quite clear * * * that he was proceeding solely on the basis of a Rule 23 class action" (440 F. 2d 1089; Cotler App. II, 19). Their further suggestion that joint review with *certiorari* in *United States* v. *Chas. Pfizer*, —— U.S. —— (1971), may somehow result in renegotiation of the settlement and thereby increase their share (Pet. 55), is sheer speculation and inconsistent with the judicial principles and policies

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* Estimated allocation to State of New York class of about $1.6 million (less court approved out of pocket expenses) is reasonably accurate to cover the actual amount of claims filed, about $1.7 million.

of compromise and settlement and the finality of judgments. See, *Florida Trailer and Equipment Co.* v. *Deal*, 284 F. 2d 567, 571 (5th Cir. 1960).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York, July 27, 1971.

Respectfully submitted,

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IN THE

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October Term, 1971

No. 70-338

COTLER DRUGS, INC., *et al.*, and LOUIS PATLOGAN, formerly doing business as PATLOGAN'S WESTERN PHARMACY,

Petitioners,

against

CHAS. PFIZER & CO., INC. *et al.*, STATE OF WEST VIRGINIA, *et al.*,

Respondents.

BRIEF FOR DEFENDANT-RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1971

No. 70-338

COTLER DRUGS, INC., *et al.*, and LOUIS PATLOGAN, formerly doing business as PATLOGAN'S WESTERN PHARMACY,

Petitioners,

against

CHAS. PFIZER & CO., INC. *et al.*, STATE OF WEST VIRGINIA, *et al.*,

Respondents.

BRIEF FOR DEFENDANT-RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief is submitted on behalf of the defendant-respondents (hereafter "the defendants") in sixty-six anti-trust treble damage actions involving antibiotic drugs. A settlement of these cases was approved by the District Court for the Southern District of New York, and the approval was affirmed by the Court of Appeals for the Second Circuit. The petition for certiorari seeks a review of the judgment of the Court of Appeals. Among the many parties to the sixty-six actions and members of classes represented in them, only these petitioners appealed from the approval of the settlement by the District Court. The distribution of a fund of almost $100 million which has been deposited in escrow by the defendants is delayed by the petition.

Opinions Below and Jurisdiction

The opinions below and the basis asserted for this Court's jurisdiction are set forth in the petition and its appendices.

Questions Presented

The petitioners have conjured up nineteen "questions" that do not include the only real question, which is whether the District Court clearly abused its discretion in approving the settlement. The defendants made the offer of settlement while denying liability, and while appeals from jury convictions of three of them in a criminal antitrust case were pending. The convictions were subsequently reversed by the Court of Appeals.

A large majority of the claimants to whom the offer was made, including the present petitioners, accepted it. The District Court gave extensive and careful consideration to the mechanics of implementing the settlement, and conducted a full hearing under Rule 23(e), Fed. R. Civ. P., as to its fairness and reasonableness. In a long and well-reasoned opinion (Appendix I to the petition), the settlement was approved.

These petitioners appealed to the Second Circuit. That court gave careful consideration to the contentions of the appellants, and with another extensive opinion (Appendix II to the petition) affirmed the decision of the District Court. The Court of Appeals recognized that the basic issue before it was whether the District Court had clearly abused its discretion. No other question would be presented to this Court if it undertook a review.

Statement of the Case

The petitioners' statement of the case is slanted and argumentative, and to some extent misleading. Neverthe-

less, we will not burden the Court with a complete statement of our own, but will merely point out some important facts which may not be apparent from the petition.

The defendants made an offer of $100 million in settlement of all claims of classes consisting of states, counties and cities ("CCS claimants"), of consumers, and of retailers and wholesalers. There was no "predetermination" of how this fund was to be allocated among the various classes of claimants. Any plaintiff who had filed suit before May 9, 1969, could present a proposed allocation plan. Seven plans were presented, including one submitted by a committee of counsel for wholesalers and retailers, of which counsel for the present petitioners Cotler Drugs, et al. were members.

The wholesaler-retailer class was represented by all plaintiffs of that class who had filed suit and accepted the settlement offer, whose actions were consolidated for settlement purposes. The court appointed the committee of counsel which consisted of all counsel of record in these actions, to represent the plaintiffs and class members.

Members of the wholesaler-retailer class, to whom notice was given by mail, were afforded an opportunity to request exclusion from the class. About 1500 did so. It appears that the vast majority of these opted out because they did not feel they had a claim, since only a few members of the class have continued to prosecute their own actions outside the settlement. These petitioners and any other class members, however, could have requested exclusion and proceeded on their own. By not doing so, they elected to abide the decision of the court as to the portion of the $100 million to be allocated to the class.

The committee of wholesaler-retailer counsel vigorously represented the interests of their class. The "Alabama Plan" of allocation, which with modifications was eventually presented to the court by the defendants, would have allocated $3 million to the class. Other plans, except one pre-

sented by the wholesaler-retailer committee, would have allocated nothing to wholesalers and retailers.

The wholesaler-retailer committee's original plan would have allocated $40 million to their class. A heated controversy arose between the committee and the representatives of the CCS claimants. The latter took the position that they would withdraw from the settlement, as they could have done, if their allocations were decreased by increasing the wholesaler-retailer allocation. The wholesaler-retailer committee, on the other hand, said they would oppose any allocation plan that gave their class as little as $3 million.

This conflict forced the defendants into negotiation with both sides, which eventually resulted in a compromise that amounted to an increase in the wholesaler-retailer allocation without a decrease in CCS allocations. Thirteen actions on behalf of wholesalers and retailers had been consolidated. Counsel in twelve of these agreed to the compromise. The only active dissidents on the committee were counsel for the present petitioners Cotler Drugs, Inc. et al.

The compromise involved an agreement by the defendants under which they placed in escrow approximately $85 million, which was the amount of the settlement fund after reducing the $100 million by the amount which would have been allocated to seven states that opted out. Forty-three states, the District of Columbia, Puerto Rico, and a number of separate local governments accepted the settlement. Under the modified plan submitted by the defendants and ultimately approved by the court, and under the escrow agreement, the wholesaler-retailer class was initially allocated slightly over $3 million. Nothing was deducted for opt-outs from this class, and to the $3 million was added interest on the entire fund of about $85 million for a period of 14 months.

The result of this arrangement was that the wholesaler-retailer class will receive over $11 million, plus interest on that amount from December 23, 1970 to the time of distribution. The defendants made a substantial concession to bring this about, since the settlement offer did not obligate them to deposit money in advance of payment to claimants or to pay interest.

Argument

The petitioners' arguments are long, rambling and repetitious, and we suggest that they justify denial of the petition under paragraph 4 of Rule 23 of this Court. The arguments, fifty pages in length, consist of ten points plus a conclusion. The only actual question, however, is largely ignored. That question, as stated above, is whether the District Court clearly abused its discretion in approving the settlement and whether the Court of Appeals erred in holding that there was no such abuse.

The defendants and representatives of plaintiffs in these 66 cases engaged in almost a year of negotiations before the settlement offer was made. The proposed settlement has been under consideration by the courts for more than two years since then. Meanwhile, the antitrust convictions which resulted in a flood of damage litigation of which these cases are a part were reversed by the Second Circuit. Upsetting this settlement not only would undo the results of tremendous work, but would discourage antitrust defendants generally from making settlement offers, particularly in situations where, as here, the question of violation is far from clear.

The petitioners pay little heed to the fact that settlement and not litigation is here involved. In a settlement context the lower courts needed only to decide that there were doubtful issues. Nothing in these decisions deserves the attention of this Court.

The Alleged Failure To Follow "Settled Principles of Law"

When the petitioners reach Point IV of their argument (p. 33) they finally recognize that the question involved here is approval of a settlement. They there try to create a non-existent "conflict" between the decision of the Second Circuit in this case and that of the Sixth Circuit in *Cohen* v. *Young*, 127 F.2d 721 (6th Cir. 1942). In the *Cohen* case, the Sixth Circuit held that a District Court had erred in approving a class action settlement solely on the basis that all the attorneys for plaintiffs except the appellant's attorney had recommended approval, without any evidence. The facts here are vastly different.

The District Court in these cases had before it the complete records of two full trials of government cases involving substantially the same charges as were made here. One of these, the trial of a Federal Trade Commission case, is not mentioned in the petition, but its final outcome was a dismissal of all conspiracy charges such as the complaints in these cases make. The other was the trial of a criminal case brought by the government, which resulted in a jury verdict against three of the defendants, but the convictions were reversed by the Second Circuit for instructional errors. In addition to these records dealing with the general merits of the charges, the District Court considered affidavits and other evidence dealing with the relative merits of the claims of various classes of claimants to portions of the settlement fund.

The petitioners are not in a position to attack the overall adequacy of the $100 million offer, since they elected to look to that fund for satisfaction of their claims. They make the unsupported assertion (Petition, pp. 37-38), however, that the offer would never have been accepted by the class of direct purchasers (wholesalers and retailers) unless

class allocations "were to be based on claims filed and the applicable law." The fact is that the petitioners chose to remain in the settlement with full knowledge that the allocations were within the discretion of the court and that there were unsettled questions on the merits of which the court would not have to make a determinative decision. Further, it is presumptuous of the petitioners to say that "the class" would not have accepted the final allocations, in view of the fact that an overwhelming majority of the accepting class members, represented by all members of the wholesaler-retailer committee of counsel other than counsel for some of the petitioners, indicated satisfaction with the allocation to their class, and no one other than petitioners took an appeal.

The Hanover Shoe Case

The petitioners urge that the decisions of the District Court and the Second Circuit are erroneous because they have "practically eliminated" (Petition, p. 21) the right of direct purchasers to sue, and because (Petition, pp. 25-28) they permit a "pass on" defense, according to the petition contrary to this Court's decision in the *Hanover Shoe* case, 392 U. S. 481 (1968). Again, petitioners ignore the fact that these cases are being settled and not litigated. The District Court did not have to, and in fact could not, decide whether a "passing on" defense could be valid if the cases were litigated. The court can scarcely be said to have "practically eliminated" rights of the wholesaler-retailer class, since it allocated over $11 million to the class.

The Court of Appeals, in affirming, noted (Pet., Appendix II, p. 16) that this was not a case where passing-on was being used as a defense to avoid liability, but rather as an attempt to award damages to those who, assuming a violation of law denied by defendants, ultimately paid

higher prices (consumers), and to avoid a windfall to those who were not injured (wholesalers and retailers). It further said that the use of the doctrine here would not act to limit or frustrate treble damage claims but would have the opposite effect. Also, the court said (Pet. Appendix II, p. 17) that the situation was like the "cost plus" exception recognized in *Hanover Shoe*.

The Court of Appeals concluded that the District Court was well within its discretion on this point. (Pet., Appendix II, p. 17.) This conclusion raises no issue which justifies further review by this Court.

Consumer Classes and *"Parens Patriae"*

As a corollary to the petitioners' arguments as to their own rights, they urge that the treatment of consumers was erroneous. Arguments to this effect are scattered through the petition, somewhat confusingly. In general, the petitioners seem to assert both that consumers have no claims and that the representation of consumers by states was improper.

As at all other points, the petitioners here disregard the fact that what the District Court and the Court of Appeals had before them was a settlement. The cases cited for the proposition that consumers have no standing to sue are distinguishable in that they involved litigation and not settlement. In making the settlement offer the defendants did not admit that anyone had a meritorious claim for damages. They agreed to put up a large sum in order to dispose of all claims that had been asserted by various classes of claimants, including claims asserted on behalf of consumers, regardless of whether consumers could recover if the cases were litigated.

In litigation it might be held that consumers cannot recover.* Here, however, the task of the District Court was a discretionary determination of how much of a definite sum should be allocated to dispose of particular claims. As the Court of Appeals held, the allocation made to consumers was not an abuse of that discretion. Nothing was decided with any precedential effect that this Court should consider.

As to the representation of consumers by states, petitioners urge that the states were permitted to share in the settlement on behalf of consumers on a *parens patriae* theory. As the petition recognizes, however, and as the Court of Appeals indicated (Pet., Appendix II, p. 19), the District Court did not proceed on the basis of *parens patriae* but on that of the states acting as class representatives for their consumers, under Rule 23. The share of the settlement fund which was allocated to consumers is for individual consumers and not for the states, as an allocation on account of *parens patriae* claims would have been.

The published notices to consumers stated that if they did not file claims, that would constitute an authorization to the states' Attorneys General (or other appropriate legal officers) to use unclaimed funds "for the benefit of the citizens of your State in such manner as the Court may direct." The provision for court control eliminates any danger such as the petition suggests (p. 42), that "states hungry for revenue * * * may seize upon such opportunities as means of retaining such recoveries."

The allocation plan approved by the District Court is a "first-stage allocation." The defendants have been discharged and allocations have been made of amounts to each of the states and other suing entities, but no final disposi-

* Indeed, this is defendants' position in the actions brought by the seven states which did not accept the settlement.

tion of moneys has been directed. Each entity will seek approval of a "second-stage allocation" plan. Such plans will provide for the disposition of unclaimed consumer funds. The proponents of the "Alabama Plan" of allocation which, as modified, was approved by the District Court stated that most entities have indicated that they will seek court approval for an additional period for individual consumers to file claims, and that others will ask approval to use funds for a public health purpose, and it was recognized that the court should exercise its equitable control over unclaimed funds for the benefit of all consumers. Again, by reason of defendants' consent there was no precedential effect in this contemplated disposition of the defendants' funds.

It is clear that the district judge to whom these cases are assigned has performed his task exceptionally well. The Court of Appeals closed its opinion by saying:

> "Finally we wish to commend Judge Wyatt for the skill and diligence which he has demonstrated in conducting this difficult and complex litigation." (Pet., Appendix II, p. 25)

The Judicial Panel on Multidistrict Litigation has said of the judge:

> "We doubt that any other single judge could have done so well. Certainly no one could have been more conscientious, diligent and scrupulously fair to all parties." (*In re Antibiotic Drugs*, 320 F.Supp. 586, 588 (J.P.M.L. 1970)

The court will certainly make sure that moneys allocated to consumers will be used for the benefit of consumers. It is not accurate to say, as the petition does (pp. 58-59), that the claims of consumers who did not file claims have been assigned to the states, in the sense of an assignment permitting the states to take the moneys and use them as they choose. Here the use of the funds is subject to the control of the court.

As the Court of Appeals noted, those who did not read the published notices and make conscious decisions are not harmed in any way, and in fact will benefit from whatever use is made of the funds. In many places, they will still be able to make direct claims for cash payments if they wish.

The Grant of Certiorari In The Criminal Case

The petitioners argue that because this Court granted certiorari to review the decision in the criminal case of *United States* v. *Pfizer et al,* 437 F.2d 957 (2nd Cir. 1970), it should grant it in these cases. The contention is that the District Court in evaluating the likelihood of success in these cases relied on the Second Circuit's reversal of the criminal convictions. It is urged that if the Second Circuit is in turn reversed, and the convictions reinstated, then the rationale of the lower court's decision here is unsustainable. A further argument is that the record in the criminal case and the judge in that case indicated that there was no price fixing at the city, county and state level.

There is no relationship between the criminal case and these cases that would make the grant of certiorari in the other case a reason why these cases should be reviewed here. The District Court of course was not required to, and did not, determine with certainty the issue of whether any of the plaintiffs in these cases would recover in litigation. The purpose for which the court dealt with the likelihood of success was related to the adequacy of the $100 million settlement offer. These petitioners did not contest the overall sufficiency of that amount.

While the District Court naturally mentioned the Second Circuit's reversal of the convictions as a reason for viewing the plaintiffs' chances as slight, this was far from being the only reason. The court also relied, for example, on the fact that the Federal Trade Commission ultimately dismissed all the conspiracy charges made in its proceeding and made in these cases. Further, even assuming that violation of the antitrust laws could be established, the court noted that there were a number of doubtful questions of fact and law as to whether the plaintiffs here could prove damages. Therefore, whatever the result may ultimately be in the criminal case, the basis for the decision approving the settlement in these cases will still exist.

It is the defendants' position that the evidence in the record of the criminal case showed no conspiracy relating to any market. The fact that the trial judge in that case conceded that there was no evidence of a conspiracy to fix prices in the city, county and state markets is of no significance in regard to the allocation of the settlement fund.

The Matter of Class Representation

The petitioners make an attack (Pet., pp. 60-63, 66-71) upon the plaintiffs and attorneys for plaintiffs who negotiated and have supported this settlement. The thrust of this is that the attorneys acted in order to obtain fees, after "shopping" by the defendants for plaintiffs who would accept a "comparatively low" settlement.

Such assertions are belied by the District Court's conclusion, on the basis of its knowledge of the progress of the actions, that "the proposed compromise was the result of good-faith bargaining at arms' length." (Pet., Appendix I, p. 71) The petitioners are in substance urging that no one who supports a proposed settlement can be a proper repre-

sentative of classes to which it is proposed. The effect of sustaining such a position would obviously be that no settlement of this character could ever be made.

Summary

A grant of certiorari in these cases would hold up, and might destroy, a settlement accepted by a large majority of those to whom it was offered. Such a result could be justified only if there were questions meriting consideration by this Court. No such questions were presented in the District Court or the Court of Appeals, and none could be presented here:

1. Nothing in the lower court decisions has any precedential significance as to what might have been established in litigation. The petitioners and others were not forced, and could not have been forced, to accept the settlement offer. They could have opted out and continued to litigate, in which event it might have been held that the defendants had no liability to anyone or that a class or classes of claimants could recover to the exclusion of others. Those who elected to settle knew they were leaving the allocation of the settlement fund to the District Court's discretion, which the Court of Appeals held was not abused.

2. Nothing was decided as to whether, in litigation, states can recover for damages to their economy allegedly caused by antitrust violations. This question is involved in *State of Hawaii* v. *Standard Oil Co. of California et al*, 431 F.2d 1282 (9th Cir. 1970), now before the Court on certiorari, but is not presented in these cases. Here states were allocated portions of the settlement fund for themselves and for local government entities only on account of purchases and of reimbursements in connection with welfare programs.

3. Nothing was decided as to whether in litigation states can recover for themselves, under a *parens patriae* doctrine, damages allegedly suffered by their citizen-consumers from antitrust violations. In these cases any part of the settlement fund allocated for consumers which states may obtain will be received by them by virtue of authorization by consumers and by consent of defendants, and will be used under court supervision for the benefit of consumers.

4. Nothing was decided as to whether wholesalers and retailers could have been deprived of participation in the settlement fund, on the basis of "passing on" or the absence of damages. The District Court in its discretion allocated to them an amount now well over $11.5 million which will be greater by the time of distribution.

Settlements of massive litigation of the kind of which these cases are a part must be encouraged if the federal judicial system is to continue to function. The petitioners have been afforded a full and painstaking consideration of all their arguments by the District Court and the Court of Appeals, as the opinions of those courts demonstrate. Granting of the petition would result in further delay, while presenting no question of general importance to this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 70-338

COTLER DRUGS, INC., ET AL. AND LOUIS PATLOGAN, FORMERLY DOING BUSINESS AS PATLOGAN'S WESTERN PHARMACY,

Petitioners,

vs.

CHAS. PFIZER & CO., INC., STATE OF WEST VIRGINIA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION ON BEHALF OF COMMITTEE OF COUNSEL FOR THE CONSOLIDATED WHOLESALER-RETAILER CLASS ACTION.

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BRIEF IN OPPOSITION ON BEHALF OF COMMITTEE OF COUNSEL FOR THE CONSOLIDATED WHOLESALER-RETAILER CLASS ACTION.

This Brief in Opposition to the Granting of a Writ of Certiorari is submitted on behalf of the Committee of Counsel for the "Consolidated Wholesaler-Retailer Class Action" representing all retailer and wholesaler druggists in the United States. The Committee of Counsel was constituted by Judge Wyatt in the District Court proceedings below. It was composed of all counsel of record, as of May 26, 1969, for all parties plaintiff in the various class actions brought by wholesale and retail druggists then

pending before the District Court. Counsel for Petitioner, Cotler Drugs, Inc., were formerly members of the Committee of Counsel. Counsel for Petitioner, Louis Patlogan, was never a member of the Committee.

QUESTIONS PRESENTED.

1. Does a settlement context, in which the resolution of legal issues is consciously avoided, provide an appropriate basis for review and ultimate determination of such legal issues by this Court?

2. Is there any basis upon which this Court could find a "clear abuse" by the Courts below of their respective discretions?

STATEMENT OF THE CASE.

The history of these proceedings is fully set forth in the opinions of the two lower Courts which appear in the Appendices accompanying the Petition filed with this Court. The statements of fact and findings therein are expressly adopted and incorporated herein as Respondents' statement of the case.

ARGUMENT.

I. A SETTLEMENT CONTEXT IS INAPPROPRIATE FOR THE DETERMINATION OF COMPLEX AND DIFFICULT LEGAL ISSUES.

A. The Courts Below Consciously and Properly Avoided the Precise Resolution of Legal Issues.

Petitioners' brief characterizes the decisions rendered below as establishing broad new legal doctrines which, they say, are dramatically inconsistent with virtually every settled rule of law in the antitrust field. Having erected this enviable target, Petitioners proceed to outline in detail conflicts with prior decisions of this Court, numerous inconsistencies with the decisions of other District Courts and Courts of Appeals and a veritable epidemic of confusion throughout the land. In point of fact, Petitioners' concern in this regard is unfounded.

What the District Court did in this case, with the subsequent approval of the Court of Appeals, was to render a severely limited decision. The District Court followed precisely the standards which this Court and other courts have set forth for the proper resolution of legal issues: it expressly avoided "the determination of 'sharply contested and dubious issues'" as required by such cases as *In re Prudence, Inc.*, 98 F. 2d 559 (2d Cir. 1938) and *Glicken* v. *Bradford*, 35 F. R. D. 144 (S. D. N. Y. 1964). Judge Wyatt, in his opinion below, emphasized the necessity of adopting this course of action. He said:

> "There is a further important principle to be observed in respect of judicial consideration of proposed settlements. This is that the judge does not try out or attempt to decide the merits of the controversy. 'Any

> virtue which may reside in a compromise is based on doing away with the effect of such a decision.' " (314 F. Supp. at 741, Petitioners' Appendix, No. I, p. 70.)

This is not, of course, to suggest that the *proper* consideration was not given to the various legal issues. The District Court adopted and applied the standards promulgated by this Court in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U. S. 414 (1968). Judge Wyatt noted:

> "The Supreme Court directs the judge to reach 'an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated' and to 'form an educated estimate of the complexity, expense and likely duration of such litigation, * * * and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise' " (314 F. Supp. at 740-741, Petitioners' Appendix, No. I, p. 69.)

No concrete decisions on the legal validity of various theories were made. No attempt was made in this deliberately limited inquiry to define the precise boundaries of the *Hanover Shoe* decision nor to articulate the varied aspects of the standing to sue question with a view toward announcing settled principles of law. An educated estimate was what was required and is what was made.

The Court of Appeals said:

> "It is important to take particular note of the fact that in reviewing the compromise, this court need not and should not reach any dispositive conclusions on the admittedly unsettled legal issues which the case raises, yet at the same time we are apparently required to attempt to arrive at some evaluation of the points of law on which the settlement is based." (Petitioners' Appendix, No. II, p. 11.)

The Court of Appeals made this evaluation and concluded that the District Court acted entirely properly and within its discretion.

In view of the deliberate efforts of both of the lower Courts to avoid decisions of legal issues, Petitioners' repeated assertions that such decisions were in fact made are simply incorrect. It is manifestly unreasonable to attempt, as Petitioners now do, to attach broad import to rulings which are plainly limited in scope.

B. The Legal Issues Which Petitioners Raise Are Not Appropriate for Adjudication in This Case.

This Court has often stated its reluctance to treat with matters not properly presented by the decisions and record below. A settlement by its very nature is an often ill-defined amalgam of considerations—both legal and practical—leading to an ultimate decision based heavily on the discretion of the District Judge. The benefits of briefing and advocacy looking towards the resolution of precise legal issues are neither sought nor obtained in a settlement context. Here Petitioners bring to this Court wide-ranging, ill-defined issues of considerable consequence and ask this Court to review and decide anew issues of fact, matters of discretion, and questions of law. The answer to Petitioners' request is suggested by this Court's action in *Maryland* v. *Baltimore Radio Show, Inc., et al.*, 338 U. S. 912 (1950) where, in explaining this Court's denial of a Writ of Certiorari, Justice Frankfurter stated:

> "A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening." (338 U. S. at 918.)

More appropriate opportunities will present themselves in other cases in which the legal questions involved only tangentially in this settlement may be directly presented.

II. THE COURTS BELOW ACTED ENTIRELY WITHIN THE SCOPE OF THEIR DISCRETION IN APPROVING THE PROPOSED SETTLEMENT AS FAIR, ADEQUATE AND REASONABLE.

To succeed here, Petitioners would have to demonstrate that the Court of Appeals has so far departed from the accepted and usual course of judicial proceeding, or so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision. (Rule 19 of the Rules of this Court.) The standard of review stated in *Connecticut Ry. & Lighting Co.* v. *New York, N. H. & H. R. Co.*, 190 F. 2d 305 (2nd Cir. 1951) is applicable here. The Court stated in that case that:

> "It is well settled that the approval of a compromise is a discretionary order which can be reversed only upon a clear showing of an abuse of discretion." (190 F. 2d at 308.)

The measure of the District Court's discretion in making pre-trial determinations was stated in *City of New York* v. *International Pipe and Ceramics Corp.*, 410 F. 2d 295 (2d Cir. 1969), where the Court said:

> "In resolving these countervailing situations, the judgment of the trial judge should be given the greatest respect and the broadest discretion particularly if, as here, he has canvassed the factual aspects of the litigation." (410 F. 2d at 298.)

And, the ability of the Court to circumscribe the proceedings in a manner best suited to inform itself of those matters relevant to its decision is well established. Thus, in *Glicken* v. *Bradford*, 35 F. R. D. 144 (S. D. N. Y. 1964), the Court said:

> ". . . it is within the Court's discretion to limit the proceedings to whatever is necessary to aid it in reaching an informed, just and reasoned decision." (35 F. R. D. at 148.)

In fact, in meeting the very same contentions raised in this Court by Petitioners, Judge Wyatt, in his opinion below, stated the basic reason for their rejection. He said:

> "The few opposing members of the wholesaler-retailer class are critical of many of the procedural steps taken by the Court. Their criticisms need not be examined in detail. They all concern the orientation of the procedure toward settlement administration rather than toward discovery, decision of law points, and the like. This orientation was deliberately chosen in order to determine which class members wished to settle and which class members wished to litigate. All members were given an option to exclude themselves from their class." (314 F. Supp. at 745, Petitioners' Appendix, No. I, pp. 78-9.)

As in *Masterson* v. *Pergament*, 203 F. 2d 315 (6th Cir.), *cert. denied*, 346 U. S. 832 (1953):

> "The District Judge was, therefore, a third party to the compromise. There is no contention and there could be none, that in approving the compromise important information was concealed from him or that his participation in the settlement was subject to any infirmity. Every possible aspect of opposition was fully by him explored. In any event, he ruled against the objectors upon these matters upon the consideration of substantial evidence and in the exercise of a sound judicial discretion." (203 F. 2d at 330-331.)

In the instant case, all of the proper criteria were employed by the District Court in testing this proposed settlement. Full consideration was given to every matter raised by all of the parties below. In the sound exercise of its broad discretion, the District Court approved the settlement. There is here no departure from the accepted and usual course of judicial proceedings, but rather an instance of painstaking adherence to each and every requirement at each step in order to assure the full protection of the rights of all parties.

Similarly, there is no basis on which the decision of the Court of Appeals may be viewed as an abuse of discretion. The Court of Appeals properly reviewed the District Court opinion with a view toward intervention only upon a clear showing of abuse of discretion. (Petitioners' Appendix, No. II, pp. 10-11) Each of the contentions made on appeal was weighed by the Court in reaching its conclusion affirming the District Court. And, the Court determined that certain of the Appellants' claims—raised again in this Court—were entirely without substance. As to Petitioners' fear that private rights of action will be destroyed, the Court of Appeals' own answer is the most succinct. The Court said:

> "Secondly, to permit the use of the doctrine [*Hanover*] in the present circumstances will not act to limit or frustrate private treble-damage claims, but will, if anything, do the opposite." (Petitioners' Appendix, No. II, p. 16)

The Petitioners have offered no basis upon which this Court should issue a Writ of Certiorari.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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July, 1971.

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 1884 70-338

COTLER DRUGS, INC., et al. and LOUIS PATLOGAN, formerly doing business as PATLOGAN'S WESTERN PHARMACY,

Petitioners,

vs.

CHAS. PFIZER & CO., INC., et al., STATE OF WEST VIRGINIA, et al.,

Respondents.

PETITIONERS' REPLY BRIEF

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Respondents.

PETITIONERS' REPLY BRIEF

Prefatory Statement

The failure of all respondents to answer the points in Petitioners' Petition results from an inability or unwillingness to address themselves to the applicable law. Petitioners respectfully urge that, as respondents must know, this settlement cannot withstand any careful scrutiny. The glib assertion often repeated that because this case is labeled a "settlement" the body of law applicable to litigated cases is distinguishable (Def. Br. 8) does not begin to address itself to the contention that the District Court failed to even discuss the law of consumer recovery and the likelihood of success of CCS plaintiffs and consumers.

Respondents submit the issue for review to be solely that of abuse of discretion, and then define that discre-

tion to involve principles unique to settlements, Whereupon, respondents deem themselves excused from discussing in any intelligible detail the legality of notice to consumers and to the wholesaler-retailer class, the absence of the opportunity to be heard on the consumer notice, any of the details of the CCS negotiations and agreement predetermining the allocations without so informing other classes—and thus misleading petitioners' class, the entire concept of law created by the Second Circuit of "assignment by silence," the misuse of "pass-on," the contradiction between a court in a settlement not determining issues of law and fact and then *finding* a fact against one class without an adequate record and any real hearing, and by ignoring significant evidence in conflict with and contrary to that finding.

All of the basic violations of law portrayed herein, singly and collectively constitute an abuse of discretion by any court condoning the procedures and devices employed to accomplish defendants' dismissal. Defendants are not *giving* away money to states, etc. for consumers; they have deposited an unallocated sum for court distribution. Defendants, CCS plaintiffs and the committee of counsel should not be permitted to dictate a result contrary to all law in any class action case involving the rights of millions of purchasers, be they retailers, wholesalers, consumers or states.

The responses of several respondents contain new matters not directly addressed in the Petition, discuss the merits of the lower court judgments as the sole basis for review, and contain many contradictions and misrepresentations constituting an imposition on the Court, all of which require this reply—going to some extent into the merits, for which petitioners respectfully, but earnestly request this Court's indulgence.

I.

The Failure of Respondents to Address Themselves to the Global Nature of the Multiclass Competition Over the Settlement Fund and the Initiation of this Case as a Claims Contest does not Obscure the Need for Review by this Court.

The origination of the proceedings culminating in this appeal are embodied in a settlement offer filed in the District Court on February 6, 1969. That offer was the end result of many months of negotiation solely between the defendants and the CCS plaintiffs.[1] It was not the result of any negotiation or participation by wholesale and retail druggists and their lawyers. (See Def. Br. 5.)

By the acceptance of that settlement offer, the class litigants, who could only be representatives of the class, according to the District Court, *if* they accepted the settlement, agreed to be bound by the subsequent determinations of the court in accordance with the offer and the applicable law applied to the facts of these cases. The Court's interpretation of its role in these proceedings was announced to Petitioners' co-counsel Edward R. Johnston, and to all the class attorneys, at a hearing on April 29, 1969, prior to the acceptance of the settlement offer by Petitioners and before the Court entered its initial class action order on May 26, 1969. (J.A. 52).

The settlement offer and the proceedings which followed provided the framework for a contest over a presumably unallocated global fund to be contested for by the competing claimants.

---

1. Def. Br. 5 is misleading because it refers to negotiations between plaintiffs representatives and defendants prior to February 6, 1969, implying that all plaintiffs had their interests represented. The committee of counsel for all wholesale and retail druggists was not yet in existence.

Petitioners initially chose to remain within the settlement because the Court represented that within its discretion and in the absence of complete agreement, it would allocate to the respective claimants that to which they were entitled in accordance with the facts and the law.

The duty owed by the Court to the litigants in class actions requires fair, adequate and impartial judicial proceedings. Early in the present proceedings following the settlement offer the Court assured all class litigants that it would determine "controversial and controverted issues," that it would "determine what weight and value to give to [consumers] claims," after observing that if the dollar amount to be allocated is not agreeable to *all* claimants, "it will be allocated by the court." (W. Va. No. 44, Trans. 4/29/69 hearing, p. 38).

When petitioners appeared at the first hearing on the settlement prior to the May 26, 1969 class action order and objected to the judicial formation of a consumer class, the court stated the creation of the class is made necessary by defendants' offer and is causing no hurt because "you can say . . . that they have such poor standing as a matter of law that the allocation to them ought to be zero or one percent nominal damages or something of that sort." (W. Va. No. 44, Trans. 4/29/69 hearing, p. 240).

It is fundamental to due process of law, and axiomatic from all case law, that any court exercising its judicial *discretion* must follow the law. This is particularly important in class action litigation where absent class members are affected, and doubly important when plaintiffs' classes are competing for the same fund. No doubt, with this duty in mind from the very inception of these pro-

ceedings, the District Court agreed with that premise because it stated that the Court would make a determination absent complete agreement by all class representatives, and then that Court made the same people to whom it said this the class representatives.

For the same Court which established this ground rule in the settlement competition, to then approve and circulate a consumer notice without the wholesaler-retailer class being present or afforded the right to be heard, to then invite claims, and later ignore those claims by giving "assigned" funds, or "unclaimed" moneys to consumers without ever weighing the relative rights and the likelihood of success of consumers as a class on any statistical or other basis, much less on the dollar amount of claims filed, is serious reversible error.

This is and always was a contest over class claimants allocation. The defendants' offer itself contemplated court approval of any final allocation, and the settlement offer permitted the court (as is its inherent power and duty under F. R. 23 (e)) to make suggestions upon "disapproval of the proposed settlement." (J. A. 74). The Court did not have to accept defendants' plan merely because all the governmental bodies agreed to it and since the wholesaler-retailer class allegedly could not get out of the settlement. The Court had a duty to protect all classes, and its duty to the wholesaler-retailer class, in part, consisted of weighing the rights of states, counties and cities, and consumers who filed claims and those who did nothing.

The Court simply failed to even commence to perform this duty—by ignoring all problems of the *power* of states, etc. to be in court for consumers in the first place, and the right and power to keep the unclaimed funds of

consumers, or any existence of unclaimed funds in a claims contest.

The *multiclass* aspect of these cases is misrepresented to this Court. The competition created by the settlement offer, effectively consolidating all cases around that offer, does not permit isolation of one class's recovery by measuring factors as to that class alone without weighing the likelihood of success for other competing classes. The assertions that the wholesaler-retailer class "have no cause for complaint, that the defendants also chose to make payments for the benefit of injured consumers" (Ala. Br. 13) and that "one class cannot reach into the other classes allocations" (N.Y. Br. 7-8) deny the very scheme of this settlement. Because the District Court itself adopted this unique change suggested by CCS counsel *after* notice to the classes and *after* individual consumer claims were filed in limited number and amount, the wholesaler-retailer class was divested of its vested property rights in and to an *unallocated* part of the settlement in competition with states and consumers. Petitioners' class was illegally and unconstitutionally misled into this settlement contest once the District Court radically altered the scheme of the settlement after class notices were mailed and published.

Respondents either fail to conceive or prefer to ignore the multiclasses competing for portions of a fixed fund. This settlement is unique, and the proponents of this "global" contest, setting plaintiffs against plaintiffs with the defendants as stakeholder, have cited no precedent to support "settlement" principles applied to a *controversy* among classes of claimants. This misconception results in a general discussion of the fairness of the $100 million, but the question of overall adequacy has

nothing to do with the allocation issue and should not obscure the allocation among classes of claimants deliberately left to the Court under the settlement offer and which the Court said it would *determine* absent total agreement.

The District Court's statements that it would make a "judicial determination" when the controverted issues were presented to it by adverse plaintiffs were consistent with its duty to absent class members under Rule 23 (e). Parties acted on such statements in accepting the overall settlement, in filing individual claims for damage and in not filing independent plans of allocation, separate from the $40 million plan of the wholesaler-retailer Committee.

The Court simply failed and refused to exercise that judicial function. Rather, it delegated to CCS plaintiffs, the wholesaler-retailer committee and defendants the discretion vested in it by saying that this is an agreement and all I have to do is stamp my approval on the overall settlement and *any* allocation thereof the defendants select. The fact that the Court made the same allocation to the consumer class as was predetermined by the CCS attorneys on February 6, 1969, namely $37,000,000, even though the consumer class only filed claims for $16,500,000, bears this out conclusively.

Petitioners do not and need not assert that the Court needed to conduct a full-scale hearing as in a trial on the merits. But, the Court had a unwaivering duty to apply the existing law to the facts before it; and if the Court chose to make a *finding* of non-injury to wholesale and retail druggists who were claimants, it had to have a hearing to support such a judicial finding (entirely inconsistent itself with the settlement thesis of

respondents). Then the Court should have determined the facts and law of consumer claimants' recovery and, more particularly, of consumer class recovery of funds unclaimed by individual consumers but claimed by individual wholesaler-retailer claimants with purchase claims of over $345 million, and other special damages. The Court permitted submission of evidence on affidavits alone, over objection of individual retailer claimants and relaxed all proceedings to conform to its concept of settlement, but then as in a litigated hearing made a finding of fact of non-injury to the wholesaler-retailer class by the use of *one* affidavit, contradicted on the face of the record, referring to a uniform percentage markup of 66⅔% over cost. (J. A. 221). Finally, the Court applied the pass-on defense to the class's claims, repudiating the increased cost of doing business as a measure of damage. (As a corollary, the Court necessarily found the fact of direct injury to individual consumers and consumers as a class —again without any proper supporting evidence.)

The inconsistency of this finding and its persistent use by the court and litigants against one class—and the coincidental absence of all discussion of the likelihood of success of CCS plaintiffs and consumers—is conclusive of the advocacy of the District Court against one class—alone. (That finding is derived from the District Court's opinion, App. I, but there never were specific findings of fact rendered in that opinion and the final orders entered thereafter.)

The essential judicial function weighing each of three class's prospective recovery against the others, and applying the law and facts to fixed fund, was not performed. Nowhere, and not even by the slightest degree of intimation, have the lower courts and respondents dealt with

a) tne standing of consumers, b) the legality of CCS recovery of unclaimed funds allocated by defendants according to prearranged negotiations with CCS, c) discussed *other* measures of damage to the wholesaler-retailer class in addition to overcharges, and d) measured the prospects for success of CCS plaintiffs in view of clear evidence of the criminal proceedings that there was no evidence of an underlying conspiracy to fix prices in that market (a point which should automatically militate against that class getting 100% of its alleged damage at the expense of another class receiving 2 to 3%).

Equally, nowhere do the lower courts or respondents discuss the vast individual purchase claims of the wholesaler-retailer class, filed under oath and aggregating $345 million, in light of the result of 100+% to CCS, 100% to individual consumers, and 2-3% to wholesalers and retailers, while at the same time leaving some $25 million of *unclaimed* or *assigned* or *gift* funds to inure to CCS plaintiffs anl their special counsel because they are Rule 23 class representatives.

Nowhere do the lower courts consider the conflict of a Rule 23 representative involved in a competition with the same class it represents for the same fund. The CCS group and the consumers are competing, and the Rule 23 representatives, the CCS, have arbitrarily determined in advance the amount to be given to the class they purported to represent, and then are retaining the surplus of that predetermined allocation above the claims filed.

All respondents somehow believe that in class litigation the named parties by agreement or acquiescence can accomplish a legal result which the Court could not perform under all law, and then the Court can accede to the representatives wishes by deferring to their suggestions.

It is most basic that all plaintiffs are in court, and all entitled to all the protection and disabilities of court proceedings and the protection of due process of law. Simply put, there is no independent concept of settlement exclusive of the law that operates outside of and in derogation of it. The discretion of the court discussed by respondents in varied and contradictory terms embodies all concepts of law addressed by petitioners and which most respondents choose to ignore. Constitutional rights cannot be denied and trampled on in the name of any principle of judicial *discretion*, and the conduct of these proceedings constitutes a gross abuse of discretion flagrantly contrary to Section 4 of the Clayton Act, Rule 23 and in violation of due process of law. The Petition should be granted so this Court can so hold.

II.

The Results Accomplished by the CCS Recovery of Unclaimed Consumer Funds for the Benefit of all Citizens of States, etc. is the Same Parens Patriae Concept Currently on Review in this Court in Hawaii v. Standard Oil Co.

The defendants offer of settlement placed all plaintiffs in two categories—(A) claims of states, cities, etc. and (B) claims of wholesalers, retailers, and individual consumers, etc. In the absence of an agreed plan of allocation by plaintiffs, defendants could elect to proceed with any proposed plan or modification, and if the allocation to any government entity plaintiff under a Plan elected by defendants should be less than that under a Plan proposed by that plaintiff, then that plaintiff might "withdraw from the settlement." (J.A. 73-74).

The District Court treated the wholesaler-retailer class as locked into the settlement, stating it alone had no

right to withdraw and that to give that class more money necessarily decreased CCS recovery and would most certainly have destroyed the settlement. CCS proprietary recovery and CCS consumer recovery are treated as the same.

All CCS plaintiffs assert, along with the lower courts, that the money is for them, and for citizens at the same time. The combination of CCS—consumer monies into one fund without requirement for claims against the balance, leaves these funds to the states, etc. to either a) seek more individual claims, or b) propose a plan to the District Court which in turn can then (1) use the money for a specific project, or (2) go into the general revenue fund of the state directly or by escheat or, as in the case of the State of New York, via that State's Abandoned Property Law.

Defendants state as to the unclaimed money that:

> "The share of the settlement fund which was allocated to consumers is for individual consumers and not for the states, as an allocation on account of *parens patriae* claims would have been." (Def. Br. 9).

Such an assertion by the offerors of this settlement is immediately contradicted, refuted and impaired by:

1. The District Court effecting a *combination* of CCS allocation and "unclaimed" consumer funds when it stated in its opinion that: . . . "If the allocation to any government entity plaintiff under a Plan elected by defendants should be less than that under a Plan proposed by that plaintiff, then that plaintiff might 'withdraw from the settlement.' . . . An increase in any allocation to the wholesaler-retailer class would have resulted in a decrease by that amount in the allocation to government entity plaintiffs." (Pet. App. I, p. 40).

2. South Carolina asserting:

> "The Plaintiffs were comprised of two classes, a CCS class (cities, counties and states representing

themselves and all consumers within their jurisdiction) and a wholesaler-retailer class, representing druggists throughout the United States." (S.C. Br., p. 2).

3. The State of Alabama, etc. saying:

". . . petitioners have no grounds for complaining that the courts below allowed CCS entities to recover as trustees on behalf of those consumers who filed no claims. . . ." (Ala, Br., p. 13) and

4. Finally , the Court of Appeals stating:

"The notice stated that those not filing individual claims by a certain date would be assumed to be authorizing that state through its Attorney General to recover on their behalf. . . . To require those who wish to authorize the state to recover for them to affirmatively notify the Court to this effect would obviously, as a practical matter, be likely to reduce the amount of these recoveries to a minimum."[2] (Pet. App. II at 23).

It therefore follows that all CCS recovery of unclaimed consumer funds is initially and ultimately founded upon a *parens patriae* concept as defined by the defendants themselves in their Responsive Brief, when they made the offer based on CCS *parens patriae* complaints and accords with what CCS plaintiffs then espoused. The unclaimed funds are for the states for their own separate use without restrictions, save approval of the District Court of any plan to use the money for the benefit of *all citizens* alike—the very same benefit that a state would derive from any recovery of damages for injury to its economy. The money goes to the same citizens. Whichever of the mutually contradictory theories is the basis

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2. Failure of the District Court to afford the wholesaler-retailer class an opportunity to be heard on this notice has been attacked as a violation of due process of law since all rights of CCS plaintiffs to unclaimed consumer funds, since they purport abandonment of the *parens patriae* concept, are derived from that notice.

for CCS recovery of these funds—be it an assignment, an escheat of unclaimed money, a trust fund—the consequence is the same. The money goes to the city, county and state treasuries or to the Attorney General for all citizens alike, and is in no way limited to purchasers of broad spectrum antibiotics—over 60 million people.

Further confirmation of the importance of the *parens patriae* concept to accomplish CCS recovery of unallocated consumer funds, unclaimed or assigned, is found in CCS complaints, most of which were amended after the offer to accord with it, seeking recovery on that basis alone in the prayers of their complaints, and in the wording of the settlement offer covering "claims of . . . individual consumers arising out of their purchases, including claims of states as *parens patriae* on behalf of their citizens or on behalf of classes including the state as a consumer and all other consumers in the state." (Pet. App. I at 23).

In the "litigated" antibiotic cases (S.D. N.Y., M 19-93A) Judge Miles Lord, in distinguishing between the state acting as a Rule 23 representative and as *parens patriae*, attributes the latter concept to where "all such [unclaimed] amounts be given to the state for administration for the benefit of absent citizens," and observes that "Rule 23 does not require that the class representative be so rewarded." (Pet. for Cert. 50)

It is essential to jurisprudence and to basic justice that legal concepts maintain a certain meaning and integrity in our courts.

The rights of competing classes to examine and rely upon CCS plaintiffs' complaints and the theories they asserted for their as yet unallocated share is fundamental to orderly and constitutional procedures in class litigation. It is the facts at the time of notice which determine rights—and those facts cannot be changed after notice to any class. The change in CCS theories of recovery to an assignment by silence from a notice upon which

petitioners' class was not heard is so radical a departure from the scheme of this settlement, embodied in part by the court's assurances to all representative parties, that all actions subsequent to the class notice are vitiated unless the proceedings are restored to their initial intendment.

Predetermination of Allocation

Essential to any scrutiny of the issue of abuse of discretion in this Reply is the occurrence of a predetermination of the allocation to each of the respective classes prior to the initial offer, on its face presumably unallocated on February 6, 1969.

While the respondents claim lack of predetermination, the record is clear that CCS attorneys and defendants alone **negotiated** the settlement and that the allocation of $97 million to CCS plaintiffs which included $37 million for consumers "is the way the settlement was actually negotiated" (J. A. 199, aff'd. of David I. Shapiro). The word "negotiated" implies knowledge on the part of the other party to negotiations, namely, the defendants.

Further, the affidavit of Lee Freeman in talking of the details of negotiations by him and three other CCS plaintiffs solely for their class, states: "although plaintiffs stated and defendants recognized that tentative acceptance by state and local bodies could not be achieved without a close approximation of the allocations, defendant insisted that they could not be committed to any allocation plan in advance." (J.A. 216)

The same CCS attorneys and defendants then agreed that if the plaintiffs in all classes did not agree on an allocation plan, the defendants could select a plan of allocation. Of course the defendants selected the very CCS plan used in February 1969, to secure tentative approval from all public parties—those who, if they failed to receive their predetermined allocation had the

sole right to "opt out" of the settlement. At the same time the wholesaler-retailer class had no knowledge of this predetermination and was invited to file claims and to compete againt an *unallocated* global offer. Confirmation of this predetermination screams from the record and need only be verified by a reading of the CCS counsel, Shapiro and Freeman affidavits (J.A. 178, 207, 232). It is therefore immaterial that the defendants continued to assert lack of predetermination when they knew that the CCS plaintiffs negotiated the entire settlement and its allocation while parenthetically inserting the wholesaler-retailer class, who were not present, for the sum of $3 million. The defendants are charged with knowledge of this predetermination.

The constant assertion by all the respondents that the defendants had a right to select the Plan offered by any of the plaintiffs, or to modify said plans, was in anticipation of any possible difficulty with plaintiffs other than the CCS class with whom the defendants had negotiated the settlement. It is obvious that the arrangement which gave the final "say" to the defendants was deliberately designed to preserve the predetermined allocations of the CCS attorneys, who solely negotiated the settlement with the defendants. Even in their arguments here, respondents assert that all of the parties who *negotiated* the settlement for themselves "believed that the druggists were entitled to nothing." (Ala. Br. 6). Their assertion to this Court of an open, and not pre-arranged offer is an imposition on the Court, further aggravated by the letter of August 2, 1971, from CCS attorney, David I. Shapiro, purporting to amend or correct the previous declaration concerning this subject and again asserting lack of knowledge on the part of the defendants.

The District Court knew of this predetermination from these affidavits and the protestations of petitioners and others, before it held the allocation hearing. By refusing to make an *in depth* judicial determination, and by stamping its approval on the plan selected by defendants and ignoring the Committee's $40 million plan, stipulated by the parties to be before the Court, and by its failure to consider and weigh claims filed, the Court's judicial hearing amounted to a hoax—at least insofar as the preservation of any rights by petitioners' class are concerned. Respondents persistent claims to an unallocated offer, coupled with references to negotiations between Plaintiff and defendants prior to February 6, 1969 without specifying which plaintiffs negotiated constitutes an imposition on this Court, by itself requiring the granting of certiorari. This predetermination negatives the judicial propriety of the alleged "hearing" conducted on March 24, 25, etc., 1970. These were not hearings with evidence, but merely perfunctory acceptance of affidavits and arguments of counsel to stamp the defendants modified plan (and the Alab. Plan) with judicial approval. The Court ignored all objections to that plan (contrary to *Cohen* v. *Young*, 127 F. 2d 721 (6th Cir. 1942)); erroneously conceived of its function under Rule 23(e) forgetting its earlier statements that it would make an allocation determination in the absence of complete agreement, and disregarded a provision in the settlement offer giving the Court the right to make *suggestions* to the parties if it denied approval of any plan[3] (J.A. 74).

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3. At a Dec. 15, 1969 hearing on Notice to the classes of the allocation hearing, Harold Kohn, a leading CCS attorney, stated that the money was on the table and everybody would take his chance "that your Honor would distribute the money fairly and in reasonable accordance

Without belaboring a point termed vague by the Court of Appeals, serious charges of conflicts of interest and legal impairment by class attorneys were directed to the District Court which twice refused to conduct any hearing into these matters. To convey to this court the details and serious nature of these matters petitioners are requesting the Court of Appeals to convey a "Cross-Petition" for reformation of the Committee of Counsel to this Court.

The allegations of the Cross-Petition for removal are far from vague, and primarily reflect matters apparent from the face of the record. To say that negotiations between former co-counsel, participation in negotiations by a counsel for two competing classes, and negotiation by a class counsel already prohibited from representing part of the class, are insufficient to compel a Rule 23 hearing when "good faith" and "arm's length negotiations" are the essence of the District Court's opinion denies any significant meaning to a court's determination of class representatives and their counsel. Without a hearing the Court could not properly discount these serious matters. The record shows the careful unwillingness of the Court to become immersed in these serious but necessary questions prior to the time it was supposed to make its judicial determination of the allocations to each class. The record further reveals no basis for the as-

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with the laws and what people might be expected to get in proportion to each other had they separately litigated this matter." (CCS App. 50)

sertion of "intensive" negotiations between these same conflicting plaintiffs' counsel. (Ala. Br. 7).

These facts present an exquisite case for exercise of this Court's important supervisory powers.

Precedential Import of This Case

Any examination of this case in terms of abuse of discretion, aside from taking into account principles of due process and the legal peculiarities and disabilities of the representative parties, cannot ignore the effect of the result achieved on substantive principles of law. There can be no dispute that the law applied by the lower courts amounts to a repudiation of the increased cost of doing business as a measure of damages under Section 4 of the Clayton Act. Enlargement of the "cost plus" exception declared in *dicta in Hanover Shoe, Inc. v. United Shoe Machine Corp.*, 392 U.S. 481 (1968) is the immediate result of approval of this settlement.

Respondents persist in refusing to discuss the substantive law underlying the results achieved by the settlement allocation. The maxim that the court need not decide disputed issues of law and fact, aside from its irrelevancy to the multiclass contest created here, does not excuse **any** discussion of the application of those principles of law and of questions of fact to the case at hand. Petitioners submit that only by a non-discussion of consumer standing after purchases of price-fixed products from retailers in an independent competitive market can there be somewhat obscured from vision the absence of affirmative principles of law to support any award to consumers and then to their class representatives. Ala. Br. 12, fn. 10, cites cases for rights of consumers to sue—of course all of those cases involve the standing of cities

and states as purchasers and the fact of direct injury after trial on the merits, and none involve a broad consumer class removed once or twice from the price-fixing manufacturers by wholesale and retailer markets. Citation of *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, for the standing of remote consumers removed from price-fixers by free and independent markets constitutes another unwarranted imposition on this Court.

Again, in respondents discussions of the theory of consumer recovery, the same confusion pervades. First, the District Court discusses *no theory;* then, the Court of Appeals confirms an "assignment by silence," a theory not even advanced by CCS plaintiffs in that Court and repudiated by CCS counsel, Mr. Shapiro in the District Court when he denied its very existence. (CCS App. 54).

The concept of assignment by silence approved by the Court of Appeals has no basis in law and results in the taking of property without due process of law in this case. The vested rights of wholesalers, retailers and consumers to the settlement fund created by defendants' offer and deposit are not subject to divestiture for either public or private use without compensation. In *Chicago, Burlington R'd.* v. *Chicago,* 166 U.S. 226, 239 (1897) this Court deemed compensation for private property taken for public use an essential element in the due process of law. The Fifth and Fourteenth Amendments guarantee such rights will not be taken without due process of law.

Any rights of petitioners' class to the settlement fund in the control of the District Court, and any rights of individual consumers to that fund cannot be divested without compensation. Yet, the assignment by silence theory accomplishes that precise result. Making silence the operative fact for the loss of property rights has no

place in this case, or in a court of law. (Pet. for Cert. p. 58—remains unanswered). The approval of the so-called "Book-of-the-Month-Club" procedure compels immediate consideration, and repudiation, by this Court.

If disputed and sharply contested substantive principles of law and fact are unnecessary of decision (Com. Br. 3), the lower courts grievously erred in its discussion of assignment of unclaimed funds and pass-on, and in holding that the wholesaler-retailer class had a uniform mark-up, was not injured, and then applying the pass-on exception as the controlling rule of law, and lastly, in placing consumers within the scope of those persons directly injured with standing to sue under Section 4 of the Clayton Act.

The precedential import of this case is no more in evidence than in the *Ampicillin Antitrust Litigation* in the United States District Court for the District of Columbia, where CCS attorney Lee A. Freeman, a leading CCS counsel, cites *Illinois* v. *Chas. Pfizer,* 68 Civ. 273 (S.D. N.Y. 1968) and *West Virginia* v. *Pfizer,* 314 F. Supp. 710, 724 (S.D. N.Y. 1970) in his "Memorandum In Opposition To The Applications For Leave To Intervene" for the proposition that

> "Judge Wyatt held that the State of Illinois could maintain a class action as the proper representative of the consumers who resided within its territorial limits." (at page 6).

After stating in the same Memorandum, at page 9, that:

> "While the decisions in the *tetracycline antitrust litigation* were made in a settlement context, the rationale of those determinations accords with all relevant federal law, and applies with undiminished force to these consolidated proceedings,"

he goes on to assert that Judge Wyatt ". . . described this aspect of how retailers and wholesalers operate in the drug field. These observations apply with equal force to the present case:" (at page 12, citing part of Opinion—see Pet. App. I, p. 79-80).

Of course CCS plaintiffs intend to *and are in fact* using this case as precedent in the district courts and elsewhere to eradicate the holding in *Hanover Shoe*; and to place themselves in the position of being the beneficiaries of recovery of consumers' alleged tort claims under the anti-trust laws *when and if* they so choose. This consequence fails to comport with the broad scheme of both civil and criminal antitrust law enforcement under existing statutes.

Several most recent cases further delineate the error and serious legal consequence of the holdings herein.

In *City of Philadelphia* v. *Am. Oil Co., et al.,* Civil Action No. 647-68 (D.C.N.J.) an order was entered on July 13, 1971, in antitrust suits by motorists who purchased from retail gas stations, against major oil companies for fixing gasoline prices for 1955 to 1965 denying a consumer class. Nothwithstanding recognition of retention by defendants of ill-gotten gains from their assumed conspiracy by failure to certify a class of all ultimate users, the court refused to create that class (as opposed to one of public governments and purchasers in tank wagon quantities) stating:

> It is readily apparent that no matter how easy it is to establish damages on a class level, if it is extremely difficult or almost impossible to distribute these sums to the rightful recipients, the class is unmanageable. (p. 46)

To be sure, claimants who have filed claims in the present case, whether they are consumers or wholesalers, or retailers, are a definable quantity, but to invite more

claims by the re-opening of claim dates for one of the classes invites the *impossible* management task and offends due process by unequal treatment for one class to the detriment of another.

The same non-availability of records inherent in denial of a class of all motorists manifests reasons for the denial of a consumer class of purchasers of broad spectrum antibiotics (even assuming the consumer *knows* he bought these products). The paucity of consumer claims underscores the lack of intended remedy, *ergo* the lack of standing afforded consumers. If this case proves anything about individual consumer recovery, it is the inherent impossibility of that recovery on any individual basis even if, as here, the "insurmountable" problem of proof referred to in *Hanover Shoe* are ignored.

In *Eisen* v. *Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D. N.Y. 1971) a class approach to damages of investors from "odd-lot" dealers on the New York Stock Exchange was approved. That class recovery approach *was not* initiated in this case. It was not the scheme of this settlement and allocation contest that the classes present their respective legal and factual positions exclusive of their respective *claims* position. Quite to the contrary, the specific repudiation of *parens patriae* recovery by CCS plaintiffs coincided with the filing of plans of allocation by competing classes after the filing of individual purchase claims invited by Rule 23 notices.

The existence of this case as a claims contest is further confirmed by the proposed plans of allocation relying on claims filed, and not on total *assumed* consumer damage on a statistical basis. The arbitrary predetermined allocation to a consumer class of $37 million not only bears no relationship to claims, but cannot be rationally related

to any *assumed* total consumer treble damage on a class statistical approach, which would come to over three billion dollars.

A new body of law created especially and exclusively for governmental plaintiffs, without any new legislation, is adopted in the lower courts; and this is acomplished without any traditional safeguards carefully evolving in class litigation and in sharp contravention of the rights of other litigants and classes.

The merits of this settlement can be weighed not only against the impact resulting but also from the defendants' persistent and vigorous contention in the "litigated" antibiotic cases that as a matter of law consumers have no right to sue under Section 4 or under Rule 23, nor can states recover for them as *parens patriae,* but that right belongs exclusively to first purchasers. We know of no legitimate reason why defendants should create a consumer recovery by their conduct (the offer according to the District Court required a consumer class) in one part of a total complex of cases and then deny the rights of that class, and individual consumer claimants, in the contested part of the same litigation. If a consumer class has no viable legal existence in antitrust litigation where consumers are removed from the price-fixers by markets where independent pricing decisions are made, defendants by their offer cannot create such a class and thereby vest it with non-existing rights. So long as Court approval is sought and needed under Rule 23 (e) for a binding *res judicata* effect, class litigants are powerless to create a settlement contrary to existing substantive law. The total illegality of the settlement allocation denominates it as a clear abuse of judicial discretion.

III.

The Cumulative Effect of Respondents' Misstatements and Contradictory Descriptions of What Transpired in the District Court and of the Issue on Appeal Constitutes an Imposition on this Court Compelling Review.

The unclaimed consumer funds allocated by predetermination between CCS plaintiffs and defendants need not go to CCS plaintiffs. The sole right to opt out was given to CCS plaintiffs under ¶ I. A. of the settlement offer if those plaintiffs did not get as much as their own proposed plan of allocation. (J.A. 71, 73 ¶ E (1)). Since CCS retention was not written into the offer, the CCS plaintiffs cannot torpedo the settlement merely because they do not obtain consumer funds.

All respondents further ignore a comparison between the existing settlement allocation and the separate settlement to private hospitals and Blue Cross Insurance Companies. Private hospitals having total purchases of roughly $200 million are receiving over $22 million in settlement, while wholesaler-retailers with five times as much in purchases, or roughly $1 billion, are receiving $11-12 million. The hospital comparison is avoided, petitioners submit, because on its face it indicates an abuse of discretion to petitioners' class. (The wholesaler-retailer class was to receive $3 million plus the interest on $85 million for 13 months following the deposit of these funds, but since no final order was entered within the 13 months, due to petitioners' appeal, an additional month's interest on the total deposit accrued to the benefit of petitioners' class, which sum for the one month is about $650,000.)

All respondents pose the spectre of this settlement falling apart if a reversal is ordered by this Court. Such a result need not and probably will not follow. The De-

fendants have parted with the settlement fund and achieved the tax benefit of a write-off intended by that payment. The settlement offer itself conceives of Court suggestions upon any disapproval, and all parties indicated in the District Court the expectancy of a Court allocation absent total approval of the allocation.

The escrow deposit leaves the settlement fund for use in future settlements and to satisfy judgments against defendants in these cases. (J.A. 160, *et seq.*)

Respondents assert that petitioners seek consumer funds thereby attempting to obscure their own sacrosanct allocation in view of the entire criminal record revealing that defendants' price fixing was directed at the wholesaler-retailer, consumer market, and not the CCS market at all. The only explanation for the CCS priority is the District Court's approval of it because the priority was built into the Alabama Plan. Any analysis of the likelihood of success of the CCS class with its problems on the liability issue would necessarily reduce CCS recovery to the benefit of the wholesaler-retailer class.

All of the respondents failed to mention the dollar amount of claims filed and the relationship of purchase claims to the recovery under the allocation plan approved. This failure emanates from the disparity of the respective classes recovery—CCS plaintiffs and consumers obtained over 100% of their class damages and a windfall of $23-25 million not claimed while the wholesaler-retailer class claimants get 2 to 3% of their theoretical overcharges (including their special damages). The entire record below reveals the District Court's advocacy against the wholesaler-retailer class; for example, that Court ignored all evidence of various measures of damage to retailers, exclusive of overcharges when it approved a nuisance allocation.

Further misrepresentations pervading respondents' briefs are discussed separately below, but the cumulative effect of all the misleading comments cannot be underemphasized.

The ability of the CCS plaintiffs to accomplish this settlement through the subversion of the wholesaler-retailer class and the creation of consumer class recovery, and then CCS recovery of unclaimed, but allocated consumer funds, led to charges of conflict of interest, legal disabilities and the suggestion of collusion—into which the district court *refused* to conduct any hearing. The Alabama brief at p. 15 says "the court gave them [petitioners] every opportunity to ventilate and or place their charges fully." This is untrue; no hearing was held on representation although requested by petitioners *and others* —and was required under Rule 23 to protect absent class members. The lack of a hearing was more reprehensible since the court chose to rely on the absence of any conflicts of interest, etc. 'in leaning heavily on the wholesaler-retailer classes' attorneys' acceptance of the allocation "in good faith" and after "arm's length negotiation" with the same people with whom they were interlocked.

The respondents suggest to this Court that the Petitioners seek something which belongs to states and consumers. That is not so. All petitioners seek is merely a proper allocation for their class which accords with the facts of this case, demonstrated above to be a contest over the allocation to each class of what was represented to be an unallocated fund within the control of the District Court. This cannot be and never was addressed solely to how much any single class should obtain. (Ala. Br. 2)

It is not merely petitioners who dissented in the District Court (Ala. Br. 3). Objectors include the firm of

Peck, Shaffer & Williams on the committee of counsel, before they withdrew their legal objections to the defendants' modified plan, and other attorneys representing claimants with total purchase claims of over $75 million. The fact that only petitioners appeal should not be construed as a denial of support from other members of the class. The real question is why, in view of this appeal, does the committee of counsel which can only benefit from a successful appeal here, oppose this petition for certiorari.

There is no requirement that the CCS plaintiffs reopen the claim dates for consumer claims. The mere assertion by some states that that is what they intend does not mean that claims will in fact be invited, nor can anyone foretell how many claimants will file purchase claims in 1971-72 for purchases in 1954-1966. The question of few new claims is verified by the existence of only 40,000 claims from over 60 million prospective claimants after a massive claims program in the District Court in the summer of 1969. The impossibility of a further claims procedure, aside from its due process problems is reviewed in *City of Philadelphia* v. *American Oil Co., supra,* discussed above at page 21.

Petitioners do not say that no one who supports a settlement can be the class representative. Petitioners do assert that the class representatives should not be so designated merely and solely because they support a particular settlement. The representatives should be chosen independently of the settlement and not because of it.

Respondents suggest that petitioners seek to have the court "transfer" funds allocated to consumers from them to the wholesaler—retailer class and further state that

is impossible (Ala. Br. 15). Petitioners do not seek the "transfer" suggested but request of this Court a reversal of the allocations with directions to the District Court and to the parties to readjust the allocations, by making "*suggestions*" as contemplated upon court disapproval of the proposed allocations, so that new allocations protecting absent class members and compensating each litigant in each class in accordance with the facts and the law can be ultimately accomplished. It is within the equitable power of this Court, as it was within the province of the courts below, to require of the litigants that the allocations ultimately accomplished in these class actions be consistent with all the applicable law and the facts presented.

CONCLUSION

Respondents fail to comprehend the true nature of a petition for writ of certiorari, which does not primarily concern itself with error. In this reply since they deal with the question of error and abuse of discretion, we have replied partially in kind, without attempting to indicate to the Court that this is the basis for the granting of certiorari.

Respondents' refusal to directly answer the reasons for the granting of certiorari is a deliberate attempt to obscure the issues of law approved by the lower courts and the impact that this case will have on pending multi-class antitrust litigation. The importance of the issues raised in the petition herein remain unanswered and undiminished.

A reading of the two lower court opinions reveals them to be a manifest of error and abuse of discretion. For the

reasons stated in the petition and in this reply, this Court should grant certiorari and resolve the important issues presented herein.

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